United States Court of Appeals

for the Second Circuit

APPENDIX

75-7259

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit

FRANK LOWELL,

Plaintiff-Appellant,

vs.

TWIN DISC, INCORPORATED,

Defendant-Appellee.

Appeal from the Order of the Hon. Jacob Mishler Dated March 28, 1975

JOINT APPENDIX

JOSEPH M. WEITZMAN
Attorney for Plaintiff-Appellant
521 Fifth Avenue
New York, New York 10017
(212) MU 7-7505

WILLKIE, FARR & GALLAGHER
Attorneys for Defendant-Appellee
One Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

UNITED STATES COURT OF APPEALS
FILED
JUL 3 1975

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DOCKET ENTRIES

72 C 1582 Chief Judge Mishler

X----------X

FRANK LOWELL

-against-

TWIN DISC, INCORPORATED

X----------X

Date	Filings-Proceedings
11/21/72	Filed petition and annexed bond on removal (Supreme Court/Suffolk County).
11/29/72	Filed notice of filing petition.
11/29/72	Filed notice of motion and memorandum of law in support of motion for an order dismissing complaint.
12/11/72	Filed affidavit of Frank Lowell in opposition.
12/11/72	Filed supplemental affidavit of Frank Lowell.
12/11/72	Filed plaintiff's memorandum of law in opposition.
12/15/72	Before Mishler, Chief Judge - Case called for hearing on defendant's motion to dismiss-Motion argued-Decision reserved.
12/15/72	Filed defendant's memorandum of law in support.
1/12/73	Filed plaintiff's notice to take deposition of Robert A. Everett.
1/31/73	Filed supplementary memorandum of law in support of defendant's motion to dismiss.
2/2/73	Filed plaintiff's supplemental memorandum of law in opposition.
2/5/73	Filed plaintiff's interrogatories to defendant.
2/5/73	Before Mishler, Ch. J. - Case called for hearing on defendant's motion to dismiss. Both sides rest. Hearing concluded. Decision reserved.
2/5/73	Filed stenographer's transcript dated 2/2/73.

Continued

Date	Filings-Proceedings
2/7/73	Filed letter dated 2/2/73 from Willkie, Farr & Gallagher with attached copy of shareholders resolution.
2/14/73	Filed letter dated 2/8/73 from Robert J. Kheel.
2/14/73	Filed copy of letter from Judge Mishler dated 2/13/73.
3/14/73	By Mishler, Ch. J. - Filed memorandum of decision and order dated 3/14/73 denying defendant's motion to dismiss. (Postcards to attorneys).
3/27/73	Filed Answer.
3/29/73	Filed plaintiff's demand for jury trial.
4/10/73	Filed defendant's responses to plaintiff's interrogatories.
4/17/73	Filed defendant's interrogatories to plaintiff.
4/17/73	Filed stipulation dated 4/13/73 extending time of defendant to answer the complaint to 4/23/73.
4/25/73	Filed plaintiff's notice of motion for an order compelling defendant to answer interrogatories.
4/25/73	Filed amended answer.
4/26/73	Filed stipulation dated 4/25/73 adjourning return date of motion to 5/18/73.
4/27/73	Before Mishler, Ch. J. - Case called for hearing on plaintiff's motion to compel answers to interrogatories - Adjourned to 5/18/73 on consent.
5/16/73	Filed plaintiff's reply to counterclaim.
5/18/73	Before Mishler, Ch.J. - Case called for hearing on plaintiff's motion to compel answers to interrogatories and plaintiff's motion to dismiss. Motions withdrawn.
5/18/73	Filed letter dated 5/17/73 from Sidney S. Bobbe.
5/25/73	Filed plaintiff's answers and objections to defendant's first set of interrogatories.
5/31/73	Filed notice of motion and memorandum of law in support of motion granting plaintiff summary judgment.
6/13/73	Filed defendant's counter-statement under Rule 9(g).
6/13/73	Filed affidavit of Mark F. Hughes.
6/13/73	Filed defendant's memorandum of law in opposition to plaintiff's motion for summary judgment.
6/15/73	Filed reply affirmation of Sidney S. Bobbe and plaintiff's reply memorandum of law.

Continued

Date	Filings-Proceedings
6/15/73	Before Mishler, Ch.J. - Case called for hearing on plaintiff's motion for summary judgment. Motion argued. Decision reserved.
7/9/73	Filed notice of motion and memorandum of law in support of motion to strike plaintiff's objections to defendant's interrogatories, etc.
7/9/73	Filed defendant's memorandum in support of motion for protective order.
7/10/73	Filed letter from Willkie Farr & Gallagher dated 6/25/73.
7/10/73	Filed letter from Sidney S. Bobbe dated 7/2/73.
7/12/73	By Mishler, Ch. J. - Filed order to show cause why plaintiff's notices of deposition and discovery should not be vacated, ret 7/13/73 at 9:30 A.M., with proof of service.
7/13/73	Filed affidavit of Frank Lowell answering motion pursuant to Rule 37(a) and memorandum of law in opposition.
7/13/73	Filed affidavit of Sidney S. Bobbe answering motion for protective order and memorandum of law in opposition to motion.
7/13/73	Before Mishler, Ch. J. - Case called for defendant's motion striking plaintiff's objections to defendant's interrogatories. Motion argued. Court ruled on defendant's interrogatories. (See court's rulings.)
7/13/73	Before Mishler, Ch. J. - Case called on order to show cause why plaintiff's notice of depositions and discovery should not be vacated. Motion argued. Deposition to be held in plaintiff's office on 8/28/73 at 10 A.M. Submit order.
7/14/73	By Mishler, Ch. J. - Filed memorandum of decision and order dated 7/13/73 denying motion for a protective order, granting motion to strike answer, etc. (Postcards mailed to attorneys).
7/17/73	Filed letter from Sidney S. Bobbe dated 7/13/73 with annexed proposed order.
8/6/73	Filed notice of motion to compel defendant to permit plaintiff to inspect documents, etc.

Continued

Date	Filings-Proceedings
8/9/73	By Mishler, Ch. J. - Filed memorandum of decision and order dated 8/9/73 denying plaintiff's motion for summary judgment. (Postcards mailed to attorneys).
8/17/73	Before Mishler, Ch. J. - Case called - Filed plaintiff's motion for an order permitting the plaintiff to inspect defendant's documents, etc. withdrawn.
8/23/73	Filed notice to take deposition of Frank Lowell.
10/18/74	Filed plaintiff's notice of motion and memorandum of law to amend complaint.
11/7/74	Filed defendant's notice of motion for partial summary judgment, etc.
11/7/74	Filed memorandum of law in support of defendant's motion for partial summary judgment, etc.
11/7/74	Filed defendant's statement under Rule 9(g).
11/14/74	Filed letter dated 11/12/74 from S. Bobbe to J. Mishler re adjournment of both motions from 11/15/74 to 12/6/74 on consent.
11/15/74	Before Mishler, Ch. J. - Case called - Motion for an order granting partial summary judgment adjourned to 12/6/74 - Plaintiff's motion to leave to amend complaint adjourned to 12/6/74.
12/2/74	Filed plaintiff's reply memorandum of law.
12/2/74	Filed affidavit in opposition to defendant's motion under Rule 56 and reply to plaintiff's motion to amend.
12/2/74	Filed plaintiff's response under Rule 9(g).
12/6/74	Before Mishler, Ch. J. - Case called. Motion for an order granting partial summary judgment dismissing the three causes of action of the complaint herein argued. Decision reserved.
12/6/74	Before Mishler, Ch. J. - Case called - Plaintiff's motion for leave to amend complaint argued. Decision reserved.
12/16/74	Filed plaintiff's reply affidavit.
12/16/74	Filed plaintiff's rebuttal memorandum.
12/19/74	Filed letter dated 12/17/74 from Willkie, Farr & Gallagher to J. Mishler.
12/20/74	Filed affidavit of John H. Batten.

Continued

Date	Filings-Proceedings
12/27/74	Filed letter dated 12/24/74 to Ch. J. Mishler from Sidney S. Bobbe.
2/19/75	Filed letter dated 2/11/75 from S. Bobbe to J. Mishler
3/31/75	By Mishler, Ch. J. - Filed memorandum of decision and order dated 3/28/75 that plaintiff's motion to amend is denied and defendant's motion for summary judgment is granted. Clerk to enter judgment in favor of defendant and against plaintiff dismissing the complaint.
4/1/75	Filed judgment dated 4/1/75 that plaintiff take nothing of the defendant and that the complaint is dismissed. (Postcards mailed).
4/8/75	Filed notice of motion and memorandum of law for reargument of decision.
4/8/75	By Mishler, Ch. J. - Filed memorandum of decision and order dated 4/8/75 denying motion for leave to reargue.
4/18/75	Before Mishler, Ch. J. - Case called for hearing on motion for reargument. Marked off.
4/24/75	Filed notice of appeal. Duplicate mailed to Court of Appeals.
4/25/75	By Mishler, Ch. J. - Filed order substituting attorneys for plaintiff.

MOTION FOR LEAVE TO AMEND COMPLAINT (Filed October 18,1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

FRANK LOWELL, :

JM 72 C 1582

Plaintiff, :

-against- : MOTION FOR LEAVE TO AMEND COMPLAINT

TWIN DISC, INCORPORATED, :

Defendant. :

- X

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of the plaintiff, verified the 11 day of October, 1974, and upon the annexed proposed amended and supplemental complaint, the undersigned will move this Court on the 1st day of November, 1974, at 10.00 A.M. at the Court House, 225 Cadman Plaza East, Brooklyn, N.Y. in the court room of Hon. Jacob Mishler, Chief Judge, for an order pursuant to Rule 15(a) and 15(d), granting plaintiff leave to serve and file the said proposed amended and supplemental complaint, upon such terms as may be just.

Dated, New York, October 11, 1974.

YOURS, etc.

SIDNEY S. BOBBE
Attorney for Plaintiff
25 West 54th Street
New York, N.Y. 10019
Tel. 246-2885

TO:

WILLKIE, FARR & GALLAGHER, Esqs.
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, N.Y. 10005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- x

FRANK LOWELL, :

Plaintiff, :

-against- : JM 72 C 1582

TWIN DISC, INCORPORATED, :

Defendant. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANK LOWELL, being duly sworn, deposes and says:

1. I am the plaintiff above named, and I make this affidavit in support of my motion for leave to serve an amended and supplemental complaint, which is necessitated because new facts were discovered since the service of the original complaint and new events have occurred, which change the picture. I annex hereto the proposed amended and supplemental complaint.

2. The first and second causes of action in the original complaint sought to recover damages from the defendant upon its guaranty of performance of my employment contract with its wholly owned New York corporation known as Lem Instrument Corp. ("Lem"), which I claimed was breached when I was discharged before the expiration date thereof. In the meanwhile I brought an action against Lem in the Supreme Court, Suffolk County, to recover my damages caused by that breach. (The present action had also been brought in the same court, but removed to this court by defendant because of diversity of citizenship, defendant being a Wisconsin corporation.)

3. My said action against Lem has resulted in a judgment for Lem, the defendant therein, dismissing the complaint, and on September 11, 1974, the Court of Appeals of the State of New York, denied my application for leave to appeal to that court. Since I am advised that the judgment dismissing my complaint in the State action may adversely affect the first two causes of action contained in the existing complaint, I am withdrawing those causes of action therefrom, but in place thereof I now allege that my discharge from employment by Lem was achieved through the defendant's breach of its contract with me to keep me on the board of directors of Lem during the life of that contract, whereas during its life and on October 4, 1972, defendant deliberately removed me from the board so that it was then free to have a minority of the board discharge me from my employment without notice or an opportunity to be heard. I was unaware of the means thus employed until after my original complaint was served, by the subsequent revelation of the minutes of the meetings of stockholders and directors of Lem. And I believed it was inappropriate and untimely to amend the existing complaint until the result of the State court action became final, as it did on September 11th last. A copy of the contract whereby defendant undertook to keep me on the board of directors of Lem is annexed to the proposed amended complaint.

4. It is clear that if I had still been on the board with the concomitant right to be heard, I would have been entitled to notice of the Special Meeting at which I was discharged without notice and to present my views

and vote as to why there was no proper or just basis for my discharge or for the termination of Lem's business, which was also decided at that "Special" rump meeting of the board. The Chairman of the board of Lem was Wilton B. Gibson, who was an appointee of defendant as well as its consultant. He testified on the trial of the State action that he had expressed the opinion to John H. Batten, defendant's president and a member of Lem's board, that Lem's business should not be terminated but was well worth saving, and that even at the time of the State trial--a year later--he still felt that way; also that he felt very strongly about the Lem products and its market. He had also admitted when examined on deposition in the present case that he had told Mr. Batten that he would like to come out of retirement and work with me and see if he could not put the business on a sound footing.

4. Yet it was Mr. Gibson who was delegated to come to New York and notify me that I was discharged and the business terminated, and he admitted that up to that very moment there had been no intimation to me that anything that I was doing would be a cause for discharge; that it was a completely new thing that came to me "out of the blue." Yet Mr. Gibson was Chairman of the Board and the liaison with defendant and the one most familiar with our affairs. I mention this, not in order to retry the issues of my action against Lem, but as part of the evidence I wish to produce under my first cause of action, to show that it is not fanciful to charge that if I had not been summarily removed as a director, in violation of my contractual right, and deprived of the opportunity to

be heard at a properly called director's meeting, the termination of Lem's business and the termination of my employment contract would not have been voted.

5. In my proposed second cause of action, I will seek to show that these drastic actions were taken as a result of a long preconceived plan or strategy on the part of Mr. Batten, in concert with his attorney and others, to wind up Lem and to find a way at all costs whereby at the same time it could get rid of its obligations to me, whether or not there was any basis for doing so.

6. Due to the collapse of the space industry in 1969, particularly as it affected many manufacturers on Long Island, Lem had switched its activities from its previous electronic devices used in that industry to the development of a novel but highly technical electronic shaft encoder and its accompanying system. This development took many months before a salable device could be produced. But by June of 1970, the first sale of such a system was accomplished, resulting in a congratulatory letter to me from Mr. Batten on June 18, 1970. But only eight months later, on February 18, 1971, Mr. Batten wrote a letter to defendant's executive vice president (of which I as president of Lem was never informed) in which he said, without finding any fault with me:

> "Inasmuch as Lem continues to fall dramatically below its forecast, I have to assume we are not far from deciding to sell Lem. I wish to formalize our plans in this respect.* * *"

This letter was only revealed on the discovery granted by this court, as was a remarkable letter dated October 8, 1971, a copy of which is annexed hereto as Exhibit 1. That

letter, of which I was never informed, reveals that the defendant's appointees to Lem's board secretly plotted with defendant's attorney as to how defendant could dispose of the Lem business and assets after the end of that fiscal year, and at the same time to get rid as cheaply as possible of its contractual obligations to me, even though it had no cause to do so. And it was pursuant to that "Lem Divestiture Strategy"--as the letter was entitled--that led to the very tactics later used. Thus, the holding of the secret meeting of the board of Lem, the adoption of the resolution to discharge both Everett and me for unspecified "cause," after receiving a mere verbal report from Mr. Gibson, and because the business of Lem had not reached its "anticipated goal" followed the plan thus conceived without justification in fact.

7. Yet nowhere in the employment contract or elsewhere is there any mention of an obligation to reach "anticipated goals." And, significantly, when Mr. Gibson notified me of my discharge, which he admittedly did "out of the blue," he refused to tell me (or Everett) what the "cause" was. Thus, it is now evident, which was not the case when the complaint herein was served, that the defendant contrived long before it had any basis for doing so, to terminate my employment by Lem, and to manufacture a plausible but fraudulent excuse therefor, and also to use pressure tactics to force me to accept an unsatisfactory settlement.

8. I also believe that my proposed Third Cause of Action is highly meritorious. Under the Stock Acquisition Agreement, I was promised that if the business of Lem

should show a profit at the end of any fiscal year, I was to receive additional shares of defendant's stock, valued to the extent of 25% of such net profit, but not to exceed in all stock of the value of $233,333.00, as my share. At the time tha Iem's business was terminated and I was discharged the business of Iem was, in my opinion and that of Mr. Gibson, on the threshold of substantial profitability, because the technical development work had almost all been completed, and a good will of important customers had been received in the form of repeat orders. And we were prepared in the ensuing year to embark on an expansion of our facilities in order to go into a much more profitable scale of production, instead of the development stage engaged into up to that time.

9. By my Third Cause of Action I seek to recover my damages resulting from the premature and arbitrary termination of the business of Lem, thus cutting me of from the possibility of receiving additional shares of defendant's stock if Iem's business should have proved profitable in the fiscal years ending June 30, 1973, June 30, 1974 and June 30, 1975, which was prevented by the termination of the business just as it was on the sure road to success, as Mr. Gibson was fully convinced it was.

10. The Fourth, Fifth and Sixth Causes of Action are all derived from express obligations of the Stock Acquisition Agreement and need no further explanation from me.

11. I make this application in good faith, in the belief that I will be able to establish the allegations of the amended and supplemental complaint upon a trial.

Frank Lowell

FRANK LOWELL

Sworn to before me this
[illegible] day of October 1974

EXHIBIT 1 - LETTER DATED OCTOBER 7, 1971 ANNEXED TO FOREGOING AFFIDAVIT

608

EXHIBIT 28 - Report (Introduced at page 393)

PERSONAL AND CONFIDENTIAL

INTER-OFFICE COMMUNICATION

W E & G

TWIN DISC, INCORPORATED
Racine, Wisconsin

October 7, 1971

TO: Mr. John H. Batten

cc: Mr. W. B. Gibson
Mr. R. T. Howell
Mr. D. E. Beaton
Mr. R. S. Gibbs

SUBJECT: LEM DIVESTITURE STRATEGY

RECOMMENDATION:

Messrs. Gibson, Howell, Gibbs and Batten met on Wednesday, October 6 to formulate a final recommendation on the proposed divestiture of LEM. Having reviewed the various alternatives (see the "Decision Tree" attached), it was concluded that the immediate divestiture of LEM would have a substantial adverse effect on 1972 Twin Disc earnings. This would come at a time when there is a degree of uncertainty about profits from our normal operations in the coming year. Given this potentially adverse impact on our fiscal 72 earnings, it was the concensus of the meeting that Twin Disc should postpone the decision to divest itself of LEM until the end of this fiscal year. It is proposed that at that time another review be undertaken to see if our corporate earnings could absorb the losses incurred with the LEM divestiture. In the interim, it is recommended that Twin Disc make certain operating changes regarding its control of LEM. It is suggested that a system of management by objectives be instituted and that Frank Lowell be held to account for meeting objectives set down by the Board of Directors. It is further recommended that the Board of Directors undertake to document the managerial capabilities of LEM management in general and Frank Lowell in particular. This would serve to build up evidence which could be used at a later date should it be necessary to enter litigation in the disposal of LEM.

DISCUSSION:

It is our intention here to briefly review the alternative courses of action that are open to Twin Disc regarding the divestiture of LEM.

In a letter to Bob Howell dated September 24 Lybrand, Ross Bros. & Montgomery recommends any disposition of LEM be handled as a sale of assets with a subsequent liquidation of LEM as opposed to the sale of LEM stock. This approach would have the most advantages tax benefits for Twin Disc.

Due to contractural requirements, Twin Disc must give six months notice to Lowell and Everett before it can dispose of LEM or its assets. Rather than try to look for an outside customer, thereby creating a greater delay, it is envisioned that an offer would be made by Twin Disc to LEM to buy the assets. While the initial offer would be to exchange LEM's assets for the 6,624 shares of Twin Disc stock that Lowell and Everett own. It is conceivable that the purchase price could go as low as $1. This offer could be made now or at some future date.

If the offer were made now, it would either be accepted by Lowell and Everett or refused. If the offer were accepted at an assumed purchase price of $50,000 in this instance, the affect on 1972 Twin Disc earnings would be a $94,000 loss. It is unlikely that Lowell and Everett would accept this type of an offer because its acceptance would bring about the termination of the lucrative employment contracts.

It is more likely that any Twin Disc offer to sell LEM to Lowell and Everett would be refused, in which case we would have to confront the question of the employment contracts. At this point we would have the choice of entering litigation or attempting to settle out of court. If we were to litigate, it was agreed that it would be to Twin Disc's benefit to take the initiative and enter a suit in Federal Court in Milwaukee under Section 10B (5) of the Securities Act as well as try to obtain a Declaratory Judgment. In the former case we would have to prove that Lowell and Everett made misrepresentations about LEM, its customers and its future. To win a Declaratory Judgment we would have to prove that Lowell had not carried out his management duties diligently. If Twin Disc doesn't take the initiative to enter suit, it is almost certain that Lowell will take us to court in an attempt to get the highest possible judgment from us.

To go the litigation route would require from one and one-half years to three years in court at a cost of $10-$25,000. The affect on 1972 Twin Disc earnings would be a $67,500 loss, and more important we would lose control over the timing of the major loss associated with the employment contracts.

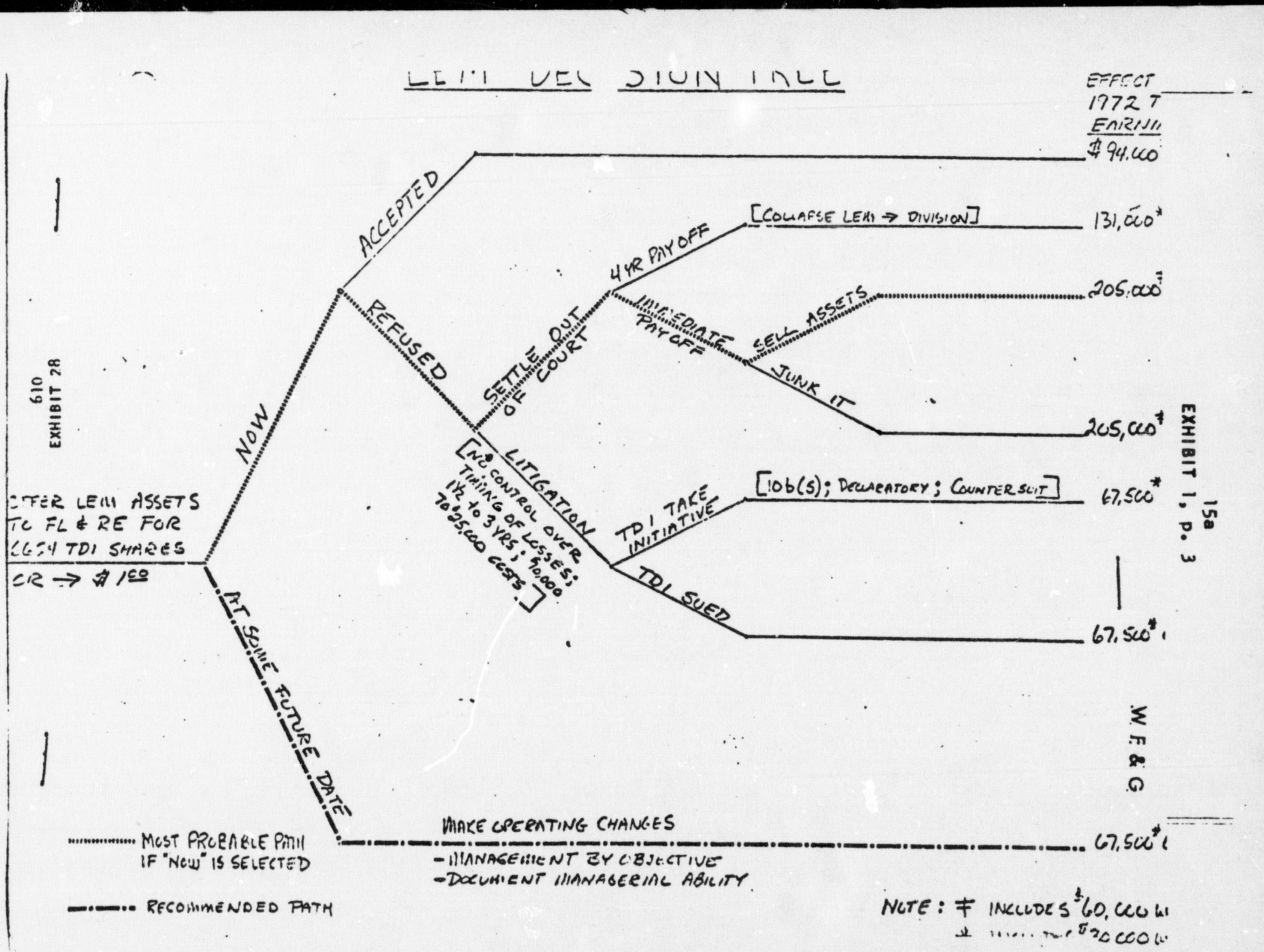
It is more probable that we would try to settle the employment contracts out of court, in which case the payment would be made immediately or over the four year duration of the contract. Afterwards the assets could be sold or junked. The four-year payoff would cost us $131,000 in 1972 earnings, while the more likely immediate payoff could cost us $205,000 in losses.

Consequently, in summary, if we were to make an offer to Lowell and Everett in the near future, we on the one hand face a prospect of incurring substantial losses which would have to be charged against 1972 earnings, or on the other hand take on the long drawn out court fight, which conceivably could run as long the employment contracts themselves, and at the same time lose control over when we may want to take the losses associated with the contract judgments. It is for these reasons that we recommend against the disposition of LEM at the present time and further recommend that the question be raised again by next July in light of the business forecast for fiscal 197

Should you have any further questions regarding this recommendation, I will be happy to meet with you at your convenience.

eb

Michael E. Batten


LEM DECISION TREE
EFFECT 1972 T EARNIN
$94,000
[COLLAPSE LEM → DIVISION]
131,000*
ACCEPTED
4 YR PAY OFF
205,000*
IMMEDIATE PAY OFF
SELL ASSETS
JUNK IT
205,000*
610 EXHIBIT 28
NOW
REFUSED
SETTLE OUT OF COURT
LITIGATION
[NO CONTROL OVER TIMING OF LOSSES; 1½ TO 3 YRS; $10,000 TO $25,000 COSTS.]
[10b(5); DECLARATORY; COUNTERSUIT]
67,500*
TDI TAKE INITIATIVE
TDI SUED
67,500*
OFFER LEM ASSETS TO FL & RE FOR 66¾ TDI SHARES OR → $150
AT SOME FUTURE DATE
MAKE OPERATING CHANGES
67,500*
-MANAGEMENT BY OBJECTIVE
-DOCUMENT MANAGERIAL ABILITY
MOST PROBABLE PATH IF "NOW" IS SELECTED
RECOMMENDED PATH
NOTE: * INCLUDES $60,000
15a EXHIBIT 1, p. 3
W.F.&G.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

FRANK LOWELL, :

Plaintiff, :

-against- :

TWIN DISC, INCORPORATED, :

Defendant. :

- X

JM 72 C 1582

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiff, by his attorney, Sidney S. Bobbe, for his Amended and Supplemental Complaint, alleges as follows:

FOR A FIRST CAUSE OF ACTION:

1. That he is a citizen and resident of the State of New York, and defendant is a corporation incorporated under the laws of Wisconsin, and it has its principal place of business in Racine, Wisconsin. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

2. That on July 3, 1968, the defendant entered into a written contract, designated as "Stock Acquisition Agreement", with plaintiff and one Robert Everett, whereby defendant undertook, among other things, to purchase from plaintiff and Everett all of the outstanding shares of capital stock of Lem Instrument Corp. ("Lem") of which corporation plaintiff was then president and a director.

3. That at the same time and place Lem entered into an employment contract with plaintiff, whereby he was employed as its president and general manager for a period of seven years, and at the same time defendant executed and delivered to plaintiff its written guaranty of performance of said employment contract, a copy of which is annexed hereto as Exhibit A

4. That thereby defendant agreed to vote its shares of Lem stock, then being acquired by it, so as to elect plaintiff to Lem's board of directors during the life of the agreement.

5. That upon acquiring said shares, defendant did elect plaintiff to said board and continued to retain him on said board until October 4, 1972, at which time it arbitrarily removed plaintiff from said board without notice or cause and in violation of said agreement.

6. That immediately thereafter defendant wrongfully caused a Special Meeting of the board to be held on the same day at its office in Racine, Wisconsin, without any notice of any kind to plaintiff; and said meeting was attended only by three directors, which was less than a quorum, all of whom were appointees of defendant and either officers or employees of defendant, and at said meeting defendant caused a resolution to be adopted to terminate the business of Lem as expeditiously as possible and at the same time to terminate the employment contract of plaintiff as well as that of Everett. A copy of the minutes of said meeting is annexed hereto as Exhibit B.

7. That on October 9, 1972, defendant caused the business of Lem to be terminated forthwith and plaintiff's employment as president and general manager of Lem to be terminated without notice and without advising him of the cause therefor.

8. That said result would not have been accomplished had not defendant thus removed plaintiff from the board of directors of Lem in violation of its agreement to keep him on the board during the life of the agreement.

9. That by reason of the premises the plaintiff has been damaged to the extent of $250,000.

FOR A SECOND CAUSE OF ACTION:

10. Plaintiff repeats the allegations and each of them set forth in the First Cause of Action.

11. That long prior to October 4, 1972, and long before Lem or defendant had any cause to terminate plaintiff's contract of employment, defendant had decided to terminate the business of Lem after the end of the fiscal year ending June 30, 1972, and at the same time to terminate arbitrarily plaintiff's employment, in order to attempt to rid itself of its guaranty of the said employment contract and of the obligation of the Stock Acquisition Agreement.

12. That pursuant thereto it devised a plan in bad faith to contrive an artificial and fraudulent excuse for having Lem discharge plaintiff in order to be able to force him to accept a lesser amount in settlement than that to which he was legally entitled, and to that end it proceeded secretly to sow seeds of discord between plaintiff and Everett, including encouraging the latter to question plaintiff's authority as president of Lem, and then seizing on such discord as a reason for discharging plaintiff as well as Everett, which it did on October 11, 1972.

13. That also pursuant thereto the defendant terminated the business of Lem and discharged all its employees at the same time.

14. That thereafter defendant induced Everett by promises of reward, including future employment, to testify falsely against plaintiff in an action brought by him

against Lem for damages, resulting in a judgment in favor of Lem.

15. That by reason of the premises the plaintiff has been damaged in the sum of upwards of $250,000.

FOR A THIRD CAUSE OF ACTION:

16. Plaintiff repeats the allegations contained in the First and Second Causes of Action.

17. That by the terms of the said Stock Acquisition Agreement plaintiff was entitled to receive in exchange for his shares of Lem's stock, stock of defendant of the then market value of $100,000.00, which he did receive.

18. That said agreement further provided that if during any of the seven fiscal years ending June 30, 1975, the business of Lem should show a net profit, computed as set forth in said agreement, additional shares of defendant's stock to the extent of the value of 25% of such net profit would be delivered to plaintiff and Everett (of which plaintiff would receive two-thirds thereof), provided, however, that such additional shares did not exceed in value the sum of $350,000.00, or $233,000.00 as plaintiff's share.

19. That by prematurely terminating the business of Lem and by disposing of its assets, the defendant deprived the plaintiff of the opportunity to receive such additional shares of stock, by preventing Lem from continuing the business with the concomitant opportunity to make a net profit in the ensuing and remaining period of three fiscal years of the contract.

20. That by reason of the premises the plaintiff has been damaged in the sum of $233,000.00.

FOR A FOURTH CAUSE OF ACTION:

21. Plaintiff repeats the allegations contained in the First, Second and Third Causes of Action.

22. On information and belief, that defendant has disposed of Lem, not only by the termination of its business, but by the sale of its assets other than in the ordinary course of its business.

23. That by the terms of said Stock Acquisition Agreement, defendant agreed in the event of such a sale to make available to plaintiff employment in New York City or Long Island at a comparable schedule of compensation provided in the Lem employment contract.

24. That defendant has failed, refused and neglected to make such employment or any employment available to plaintiff, in breach of said agreement, to plaintiff's damage to the extent of $250,000.00.

FOR A FIFTH CAUSE OF ACTION:

25. Plaintiff repeats the allegations contained in the foregoing paragraphs of this complaint.

26. That in said stock acquisition agreement it is provided in paragraph 10 thereof that "if at any time during the period ending June 30, 1975, Twin Disc desires to dissolve Lem, or to sell all or any of its assets other than in the ordinary course of business or to transfer ownership of any part of its interest in Lem, the Shareholders [meaning plaintiff and Everett] shall be given notice thereof and shall thereupon have the option exercisable at any time within six (6) months following such notice to acquire from Twin Disc all of the then outstanding shares of Lem at a price and upon terms 'not less favorable than the terms of such contemplated transaction'."

27. On information and belief defendant, in violation of that agreement, sold all or a part of the assets of Lem other than in the ordinary course of business without notice to plaintiff, thereby depriving him of the aforesaid option, to his damage to the extent of $250,000.00.

FOR A SIXTH CAUSE OF ACTION:

28. Plaintiff repeats the allegations contained in the foregoing paragraphs of this complaint.

29. That by paragraph 17 of said Stock Acquisition Agreement it was provided that plaintiff and Everett (designated therein as shareholders) and defendant "will continue to use their best efforts to keep Lem's business organization intact, to keep available the services of its present officers and employees and to preserve for Lem the good will of its suppliers, customers and others having business relations with Lem".

30. That defendant breached said agreement by terminating the business of Lem on October 11, 1972, and at the same time discharging its officers and employees and destroying the good will of its suppliers, customers and others having business relations with Lem, to plaintiff's damage that may exceed the sum of $250,000.00.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of $250,000.00 on the First Cause of Action; in the sum of $250,000.00 as compensatory damages on the Second Cause of Action and $250,000.00 as exemplary damages thereon; in the sum of $233,000.00 on the Third Cause of Action; in the sum of $250,000.00 on the Fourth Cause of Action; in the sum of $250,000.00 on the Fifth

Cause of Action; and in the sum of $250,000.00 on the Sixth Cause of Action, with the costs of the action.

SIDNEY S. BOBBE
Attorney for Plaintiff
25 West 54th Street
New York, N.Y. 10019
(212) 246-2885

EXHIBIT A - GUARANTY OF PERFORMANCE OF EMPLOYMENT CONTRACT ANNEXED TO FOREGOING COMPLAINT

577

PLAINTIFF'S EXHIBIT 2

For valuable consideration, TWIN DISC, INCORPORATED herewith guarantees performance of the terms of this agreement to be performed by LEM, and to vote its share of LEM Stock to elect Lowell to LEM's Board of Directors during the life of this agreement. In the event LEM is either liquidated or disposed of, either through sale of assets or through sale of controlling interest in its stock, TWIN DISC will make available to Lowell employment in New York City or Long Island on a comparable schedule of compensation (other than the additives provided under Paragraph 2.c. of the foregoing agreement), provided, however, that no part of this guarantee shall be effective in the event LEM or its assets are disposed of to Lowell and/or Everett, or to their nominees.

DATED at Racine, Wisconsin, this 3rd day of July, 1968.

TWIN DISC, INCORPORATED

By Wilton B. Gibson

Its Vice President

(Corporate Seal) Attest:

By [illegible]

Its Secretary

Plaintiff's Exhibit 2 for id. 5/2-3/73 [illegible]

EXHIBIT B - COPY OF MINUTES OF SPECIAL BOARD MEETING ANNEXED TO FOREGOING COMPLAINT

Def. Ex. OO; D. App. 49.

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS OF LEM INSTRUMENT CORPORATION

A special meeting of the Board of Directors of LEM Instrument Corporation was held in the offices of Twin Disc, Incorporated, Racine, Wisconsin on the 4th day of October 1972, commencing at approximately 11:15 a.m. Present were John H. Batten, Robert T. Howell and Wilton B. Gibson, members of the Board.

The Directors heard the report of Wilton B. Gibson as to circumstances surrounding and leading up to the unauthorized discharge of Robert Everett by Frank Lowell together with the general review of the failure of the company to meet its anticipated goals. After discussion it was

RESOLVED that Frank Lowell and Robert Everett are herewith terminated for cause as employees and officers of LEM Instrument Corporation effective immediately.

FURTHER RESOLVED that Wilton B. Gibson and Robert T. Howell, either or both of them, are authorized to negotiate with Frank Lowell and Robert Everett with respect to the possible acquisition by them, or either of them, of the assets of LEM Instrument Corporation and also in relation to their employment contract and to agree upon and to accept such terms and conditions with respect thereto as they deem appropriate with the advice and approval of Counsel and of representatives of Twin Disc who have an interest therein.

Def. Ex. OO; D. App. 50.

FURTHER RESOLVED that the authority of FRANK LOWELL and ROBERT EVERETT to sign checks on the corporation's bank accounts or to borrow money or to engage in any other banking transaction in behalf of the corporation is revoked effective immediately and that the Board herewith adopts the standard banking resolution of the Franklin National Bank, East Farmingdale, New York, which resolution shall authorize Wilton B. Gibson or Robert T. Howell singly to sign checks, notes, and similar orders on behalf of the corporation and that Wilton B. Gibson, Chairman of the Board, is authorized to certify to the Bank a copy of this resolution, and said banking Resolution.

FURTHER RESOLVED that Wilton B. Gibson as Chairman of the Board is authorized to take such steps as he deems reasonable to bring to a termination the business of LEM Instrument Corporation as expeditiously as possible and to take such steps as he deems appropriate to protect the interests of the company and its assets.

FURTHER RESOLVED that Wilton B. Gibson, Chairman of the Board, shall personally notify Frank Lowell and Robert Everett of the foregoing actions taken by the Board of Directors as soon as reasonably practical.

There being no further business to come before the Board, the meeting was adjourned.

PLAINTIFF'S MEMORANDUM ON MOTION TO SERVE AMENDED AND SUPPLEMENTAL COMPLAINT (Dated October 15, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

FRANK LOWELL, :

Plaintiff, :

-against- : JM 72 C 1582

TWIN DISC, INCORPORATED, :

Defendant. :

- X

PLAINTIFF'S MEMORANDUM ON MOTION TO SERVE AMENDED AND SUPPLEMENTAL COMPLAINT

This action was brought by plaintiff in the Supreme Court of the State of New York, and it was removed to this Court by defendant, a Wisconsin corporation, on the ground of diversity of citizenship.

The plaintiff had been employed as president and general manager of a New York corporation which was wholly owned by defendant, namely, Lem Instrument Corp., and defendant had guaranteed performance of that contract. By the first two causes of action in the original complaint it was alleged that plaintiff had been wrongfully discharged from said employment by Lem with the active participation of defendant, and that because of defendant's guaranty it was liable in damages to plaintiff caused by such discharge. However, subsequent to the institution of this suit plaintiff brought

another action in the Supreme Court of the State of New York against Lem as principal to recover damages due to his discharge. That action has now resulted in a final judgment of dismissal on the merits, the last step of which occurred on September 11th, when the Court of Appeals denied an application for leave to appeal to that court, and defendant here has stated that it will seek to have such determination held to be res judicata as to the first two causes of action.

In anticipation thereof, the plaintiff is asking for leave to serve an amended and supplemental complaint, in which, in place of the aforesaid first and second causes of action, he seeks to allege that his discharge, which was voted by Lem's board of directors, could not have been so ordered but for the fact that defendant had breached that part of its guaranty agreement whereby it agreed "to vote its share of Lem stock to elect Lowell to Lem's board of directors during the life of the agreement" (Exh. A to amended complaint). The proposed amended complaint alleges that on October 4, 1972, the defendant, as sole shareholder of Lem, at a stockholder's meeting breached that agreement by removing plaintiff from the board without notice or cause, which was immediately followed by the holding of a so-called special meeting of the board, without notice of any kind to plaintiff, and then resolving to terminate the business of Lem and to discharge plaintiff from his employment, despite the fact that his contract of

employment still had nearly four years to run.

It is plaintiff's claim that his removal from the board was a breach of his contract and that if he had not been so removed, any action taken at a special meeting of directors would have been completely lacking in legality. And especially is this so, because the meeting was attended by only three out of six directors, which was less than a quorum required.

This breach by Twin Disc, Incorporated of the agreement to keep plaintiff on the board of Lem during the life of the agreement was a matter that was not and could not have been litigated in the State court action, and is therefore not barred as a result of that action.

Moreover, the fact as to how his discharge was accomplished was not known to the plaintiff when his original complaint in this action was filed, having been revealed only subsequently, when the minutes thereof were produced by defendant.

By Rule 15(a) it is provided that leave to amend a complaint shall be given "freely when justice so requires." And by subdivision (d) it is provided that the court may permit the service of a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense."

In 3 Moore's Federal Practice, ¶15.08[2] it is said:

> "Amendments to be liberally granted.
> "The courts have shown a strong liberality * * * in allowing amendments under Rule 15(a). And in Foman v. Davis, 371 U.S. 178, the Supreme Court strongly reaffirmed the mandate of Rule 15a that leave to amend shall be freely given when justice so requires, reasoning that the entire spirit of the Rules is to the effect that controversies shall be decided upon the merits, courts have not been hesitant to allow amendments for the purpose of presenting the real issues of the case, where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed."

It is respectfully urged that certainly so far as the proposed First Cause of Action leave to grant the amendment should be "freely given," especially since the original First Cause of Action was also based on the guaranty agreement, but on another phase thereof.

The same comments and argument apply as well to the other five proposed amended statements of claim. Thus, the existence of the second cause of action was revealed only as a result of discovery ordered during the course of this action, consisting of Exhibit 1 annexed to the moving affidavit, showing that the business of Lem was terminated and at the same time plaintiff discharged from his employment, not because of any genuine cause therefor, but because both events were the result of a plot carefully devised by defendant a year before any plausible cause for discharge existed, to accomplish a financial benefit to defendant.

Since the facts could not have been known when the complaint was filed, it is a classical case for allowing service of a supplemental complaint.

The Third Cause of Action as now proposed is one that derives from the same transaction referred to in the original Third Cause of Action, based on the Stock Acquisition Agreement, whereby defendant acquired all the stock of Lem from plaintiff and Robert Everett.

And the same applies to the proposed Fourth, Fifth and Sixth Causes of Action.

POINT I

IF PLAINTIFF HAD NOT BEEN REMOVED FROM LEM'S BOARD, IN BREACH OF DEFENDANT'S CONTRACT TO KEEP HIM THERE, HE WOULD HAVE BEEN ABLE TO EXERCISE HIS RIGHT TO BE PRESENT AND BE HEARD AGAINST ANY PROPOSAL TO DISCHARGE HIM AND EVERETT AND TO WIND UP THE BUSINESS; AND, MOREOVER, THOSE DECISIONS WERE ILLEGALLY TAKEN AT THE SPECIAL MEETING OF THE BOARD HELD WITHOUT NOTICE TO HIM AND IN THE ABSENCE OF A QUORUM; AND HE IS ENTITLED TO PROVE HIS DAMAGES RESULTING FROM THAT BREACH.

By §711 of the Business Corporation Law it is provided that special meetings of the board shall be held upon notice to the directors. It is established law that "absent ratification, failure to notify directors of a special meeting renders actions taken at the meeting invalid [citing many authorities]."

per Breitel, J. in Rapoport v. Schneider,
29 N.Y.2d 396.

In that case it was held, in a stockholder's action, that where one of the directors of a corporation received no notice of a special meeting the board could not have legally authorized a payment to have been made.

To the same effect:

Koch v. Wadsworth, 232 App.Div. 483

Cirrincione v. Polizzi, 14 A.D.2d 281

People ex rel. Stevens v. Greenwood Lake Assn., 63 Hun. 633, 18 N.Y.S. 491

In the last cited case it was held that the action of the board in removing the relator from membership in the respondent association was a nullity because one of the trustees had not received notice of the special meeting. The court said, what is appropriate here, at 18 N.Y.S. p. 492:

> "The claim that there were enough votes to overcome the vote of the absent member in no way affects the question, because in order that valid action may be taken by such a board, all the members of the board must be legally summoned, although the majority may compel the action of the board when legally done; the argument being that the reasoning of one member of a board may influence, and frequently has influenced, the minds of many of his associates as to the propriety of the contemplated action, and whose votes would have been the opposite of what they were, had such member been present [citing cases]."

Here the contract to keep plaintiff on the board during the life of the contract was made for the very purpose of giving the plaintiff the right at least to be heard before any such action as his discharge and the termination of the business was taken. His removal from the board deprived him

of that right, and he surely can recover for the damages caused by that breach.

2 Fletcher, Cyc. of Corporations [perm. ed.] p. 161

The defendant also caused the meeting to act in the absence of a quorum, which, according to the by-laws, was a majority of the entire board. The entire board was six in number, and a majority would have been four, but only three were present -- all nominees of defendant.

In the resolution removing both plaintiff and Everett from the board (Exh. B annexed to amended complaint) it was stated that their places would remain vacant.

By §707 Business Corporation Law it is provided that "a majority of the entire board shall constitute a quorum * * * except that the by-laws may fix a quorum at less than a majority of the entire board."

Here the by-laws expressly provided: "A majority of the entire board shall constitute a quorum."

But the "entire board" means the entire board of six directors, notwithstanding the vacancies caused by the removal of plaintiff and Everett.

Avien, Inc. v. Weiss, 50 Misc.2d 127, 131

Cirrincione v. Polizzi, 14 A.D.2d 281

2 Fletcher, Cyc. of Corporations, p.421

Thus, defendant acted illegally in causing plaintiff's discharge, acting through its nominees, including its president,

despite the absence of a quorum, as well as by holding the special meeting without notice to plaintiff or Everett.

It accomplished all this only by its breach of its contract to keep plaintiff on Lem's board of directors during the life of the contract, and is responsible for the ensuing damage.

The proposed amendment by substituting the First Cause of Action for the original first two causes of action is proposed in good faith, so as to present the real issue in the case, and it would not result in undue prejudice to defendant or undue delay in the trial.

And what is said as to the First Cause of Action applies with at least equal force to the other proposed causes of action, all of which are asserted in good faith.

October 15, 1975

Respectfully submitted,

SIDNEY S. BOBBE
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

FRANK LOWELL, :

Plaintiff, : 72 Civ. 1582 (J.M.)

-against- :

TWIN DISC, INCORPORATED, : NOTICE OF MOTION

Defendant. :

----------x

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affidavit of ROBERT J. KHEEL, duly sworn to the 5th day of November, 1974, the Judgment upon a jury verdict entered in the Supreme Court of the State of New York, County of Suffolk, in an action entitled Frank Lowell v. Lem Instrument Corp., Index No. 73-1733, the Order of Affirmance in that action by the Appellate Division, Second Department, the Order of the Appellate Division in that action denying leave to appeal to the Court of Appeals of the State of New York, the Order of the Court of Appeals denying leave to appeal to that Court, the Appendix on Appeal and Cross-Appendix on Appeal in that action (a copy of each of which will be submitted to the Court on the return day of this motion) and the briefs of the parties submitted in that action to the Court of

Appeals, and upon all prior pleadings and proceedings herein, the undersigned will move this Court at Courtroom IV, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York on the 15th day of November, 1974, at 9:30 A.M., for an Order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting partial summary judgment dismissing the three causes of action of the Complaint herein, upon the grounds that there are no genuine issues of material fact and that the purported causes of action of the Complaint are barred by the aforesaid prior Judgment and by principles of res judicata, collateral estoppel and surety law, and for such other and further relief as to this Court seems just and proper.

Dated: New York, New York
November 5, 1974.

Yours, etc.,

WILLKIE FARR & GALLAGHER
Attorneys for Defendant

By _____
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

TO:

SIDNEY S. BOBBE, ESQ.
Attorney for Plaintiff
25 West 54th Street
New York, New York 10019

AFFIDAVIT OF ROBERT J. KHEEL IN SUPPORT OF MOTION 30

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

FRANK LOWELL, :

Plaintiff, : 72 Civ. 1582 (J.M.)

-against- :

TWIN DISC, INCORPORATED, : AFFIDAVIT

Defendant. :

----------x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT J. KHEEL, being duly sworn, deposes and says:

1. I am an attorney-at-law duly admitted to practice in this Court and in the Courts of the State of New York. I am associated with the firm of WILLKIE FARR & GALLAGHER, attorneys for defendant TWIN DISC, INCORPORATED ("Twin Disc") and am familiar with the matters hereinafter stated concerning the prior proceedings in this action and in a companion action by the same plaintiff in the Supreme Court of the State of New York, County of Suffolk. My familiarity with these matters is based on my participation in the representation of Twin Disc in this action and of Lem Instrument Corporation ("Lem"), a subsidiary of Twin Disc, in the parallel State

court action. I submit this affidavit in support of defendant's motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for partial summary judgment dismissing the three causes of action alleged in the Complaint herein and in opposition to plaintiff's motion for leave to serve an amended and supplemental complaint seeking $1,733,000 in damages.

2. The grounds for the motion for partial summary judgment are (1) that the maintenance of this action is barred by a judgment of dismissal in the State court action entered upon a unanimous jury verdict in favor of the defendant Lem in that action, unanimously affirmed by the Appellate Division, Second Department, with leave to appeal unanimously denied by the Appellate Division and by the Court of Appeals and (2) that no genuine issue of material fact exists in the case at bar precluding the grant of partial summary judgment in favor of defendant. The grounds for the opposition to plaintiff's motion for leave to serve an amended and supplemental complaint are (1) that the causes of action sought to be litigated in the proposed amended and supplemental complaint raise no genuine issues of material fact, (2) that said causes of action either were or could have been adjudicated in the State court action and are now barred and (3) that plaintiff is guilty of laches in waiting until now to seek leave to amend.

3. On July 3, 1968, defendant executed a guaranty of an employment contract between the plaintiff and Lem, a subsidiary of the defendant. The employment contract was executed at the same time that defendant acquired all of the stock of Lem, executing a stock acquisition agreement with the plaintiff and one Robert Everett, who together had theretofore owned and controlled the business of Lem. Lem discharged the plaintiff for cause in October 1972.

4. The plaintiff commenced this action against Twin Disc in October 1972. The first two causes of action pleaded in the Complaint seek damages for an alleged breach of the employment contract, claiming that plaintiff's discharge was unjustified and unlawful and invoking the defendant's guaranty. The third cause of action seeks damages for an alleged breach of the stock acquisition agreement in that Lem's business was purportedly terminated without offering the plaintiff and Everett the option to reacquire the assets of Lem and without affording to the plaintiff the opportunity to receive additional shares of Twin Disc stock. Copies of the Complaint herein and defendant's Amended Answer, asserting a counterclaim for damages sustained by Twin Disc as the result of plaintiff's mismanagement of Lem, are annexed hereto and marked Exhibits A and B respectively.

5. In January 1973, the plaintiff instituted an action against Lem in the Supreme Court, State of New York, County of Suffolk, for Lem's alleged breach of the same employment contract. Copies of the Complaint and Lem's Amended Answer in that action are annexed hereto and marked Exhibits C and D respectively.

6. Plaintiff has been represented by the same attorneys in this action and in the Lem action in the State court. Our firm has represented Twin Disc in this action and Lem in the State court action. The pleadings in both actions (Exs. A, B, C and D hereto annexed) disclose that the plaintiff has asserted identical causes of action for breach of the same contract in each of the actions.

7. Without reciting the extensive motion practice which I believe this Court may recall, suffice it to say that in the State court action plaintiff waived all pretrial discovery against Lem and rushed the action to trial; on October 9, 10, 11, and 12, 1973 - barely ten months after the action was commenced - plaintiff's State court action was tried before Hon. John F. Scileppi and a jury. A unanimous verdict in Lem's favor resulted.

8. Plaintiff appealed that Judgment to the Appellate Division, Second Department. The verdict was unanimously affirmed. Plaintiff moved in the Appellate Division

for leave to appeal to the Court of Appeals. That motion was unanimously denied. Thereafter plaintiff moved in the Court of Appeals for permission to appeal. That motion was also unanimously denied. A copy of the Judgment of Dismissal, the Order of Affirmance, the Order of the Appellate Division denying permission to appeal to the Court of Appeals and the Order of the Court of Appeals denying permission to appeal to that Court, and subsequent decisions, are annexed hereto and marked Exhibits E-H respectively. Thus it is patent that plaintiff chose his forum, litigated and lost. Defendant's motion for partial summary judgment is predicated on that simple fact.

9. In view of the foregoing, I asked plaintiff's attorney if plaintiff would voluntarily withdraw this action. I was subsequently informed that plaintiff refused to do so. Shortly thereafter, we received plaintiff's motion for leave to serve an amended and supplemental complaint (the "proposed amended complaint") - an obvious attempt to avoid summary judgment by replacing the original Complaint with a proposed amended complaint drawn with the hope of avoiding the bar arising by virtue of the prior litigation. Significantly, in plaintiff's moving affidavit he is forced to concede that the Judgment in the State court action "may adversely affect" the first two causes of action of the original Complaint. But for plaintiff's motion for leave to amend,

there would be no reason not to enter partial summary judgment dismissing the Complaint. The proposed amended complaint provides no such reason.

10. No matter how hard plaintiff tries, he cannot avoid the impact of the Judgment in the State court action. His moving papers repeatedly raise the same issues as had been put to rest in that action. In order to appreciate fully the similarity between the claims that plaintiff now wishes to press on this Court and those that were fully litigated in the State court action, it is necessary first to review briefly the proceedings at the trial of the latter action. Although a 650-page Appendix on Appeal was prepared by plaintiff, concise summaries of the evidence and contentions of the parties are contained in plaintiff's brief in support of his application to the Court of Appeals to appeal to that Court and Respondent's brief in opposition. Copies are annexed hereto and marked Exhibits I and J respectively.

(A) At trial plaintiff was the only witness for himself. On behalf of Lem, the following persons testified: John Batten (Chairman of Lem's Board of Directors and President of Twin Disc), Wilton B. Gibson (a Director of Lem and a former Vice President of Twin Disc), Robert Everett (plaintiff's former partner and

fellow-employee), Joseph Samuel (a fellow-employee) and Gordon Danhoff (a salesman of Lem hired by Twin Disc to help Lem). According to the evidence adduced at trial in 1968, plaintiff (together with Mr. Everett) received $100,000 in stock of Twin Disc for their interest in Lem.

(B) Thereafter plaintiff received $35,000 per annum (a total of $157,000) until his discharge on October 9, 1972. During that period Lem incurred substantial losses in each year aggregating over $256,000 for the period, and Twin Disc poured in an additional $482,000 in cash contributions. At trial there was substantial evidence of plaintiff's shortcomings. Suffice it to say that, despite plaintiff's glowing sales projections which frequently exceeded $100,000 and reached as high as $300,000, Lem's sales repeatedly failed dismally. During twelve separate months no sales were made; in six months sales were merely a few hundred dollars; and there were no months in which sales exceed $13,344. In one year net sales were a mere $985.50. When Twin Disc hired Mr. Danhoff to help with Lem's sagging sales, plaintiff refused to cooperate with him and denied potential customers sales information.

(C) As to employee relations, plaintiff fired, at one time or another, all the important employees

of Lem. On August 12, 1972, without notice to anyone, plaintiff fired his former partner, Robert Everett, whose contract was also guaranteed by Twin Disc. In May 1971, plaintiff fired Mr. Samuel, a valuable employee, and the inventor of the only product of value at Lem. There was testimony that Mr. Everett had prevailed upon Mr. Samuel to return for a brief period to finish up the job he was then working on. But, despite subsequent efforts to persuade him to remain, Mr. Samuel refused to do so or to take Mr. Lowell's continuing disrespect, even though it meant unemployment for several months. As Mr. Samuel so poignantly testified at trial: "I told him [Mr. Lowell] I couldn't take any more of the abuse, it was almost every day, and I was just, you know, tired of it and I didn't want to take any more. . . ." According to both Mr. Samuel and Mr. Everett, Mr. Lowell was in the habit of calling them "schmucks", "incompetent idiots" and other equally derogatory names. Plaintiff also fired Mr. Coruzzi, Mr. Samuel's successor.

(D) Indeed, Mr. Lowell's "erratic behavior" and "shouting and screaming at small incidents that really meant nothing" led Mr. Everett, who was in daily con[illegible]

with Mr. Lowell, to conclude that plaintiff needed psychiatric help. Plaintiff himself acknowledged that Everett had told plaintiff that plaintiff was "crazy". Indeed, his abusive and petulant attitude manifested itself at trial. Thus plaintiff interposed his own objection: "I think that is an improper question" and asked the Court for a ruling. His objection was overruled. On another occasion, although the Court had sustained respondent's objection, plaintiff interjected: " I think that is an important point, Your Honor". The Court replied: "Are you the lawyer or is your lawyer representing you? I have ruled on it". Plaintiff added "Yes sir" in a belligerent tone, and the Court responded emphatically "Objection sustained". In addition, I am informed and believe that, contrary to his attorney's advice and without informing our firm as attorneys for the defendant, the plaintiff recently took a trip to Wisconsin to talk to representatives of the defendant and to inform them that, unless they met his exorbitant and bizarre demands, he would take the very step that he has now taken by moving for leave to serve an amended and supplemental complaint.

11. In short, there was ample evidence to support Lem's defense that plaintiff breached the employment agreement

and that his discharge was legally justified. As noted, a unanimous jury verdict for the defendant Lem was unanimously sustained upon appeal.

12. Despite this adverse testimony, despite the adverse jury verdict and the adverse decisions on appeal, the plaintiff still refuses to recognize that it was his patent shortcomings that caused Lem's losses and that his distorted, erroneous perception of reality has been rejected by a jury. Thus, in paragraphs 7-9 of his affidavit he recites that Twin Disc "contrived" to fire him, that Lem was on the "threshold of substantial profitability" and that he was discharged "without justification in fact". And, as throughout the State court action, plaintiff's proposed amended complaint urges that Lem's large losses were not his fault; that he was wrongfully removed as a Director of Lem and wrongfully fired as an officer and employee; that economic factors caused Lem's problems, and that the Directors of Lem, who are also officers of Twin Disc, trumped up his discharge.

13. As to this latter theme, the most articulate statement of it was made in plaintiff's brief to the Court of Appeals in support of his motion for leave to appeal. At pages 12 and 13 of that brief he states:

> "Plaintiff submits that the real reason for his discharge by defendant, which lost money from the in-

> ception of his seven-year employment contract in July 1968 (Ex. 2, 571-6) to his unwarranted discharge in October 1972, is found in a most revealing inter-office communication, marked 'personal and confidential' of Twin Disc, Incorporated, the conglomerate which became the owner in July 1968 of defendant's shares of stock through purchase thereof from plaintiff and his quondum associate, one Everett (Ex. 28, 608-9). (Plaintiff's employment contract with defendant was guaranteed by Twin Disc [Ex. 2, 577]. This memorandum, entitled 'Lem Divestiture Strategy' and dated October 7, 1971 - one year before plaintiff's trumped up discharge - is so revelatory of defendant's early designs to get rid of plaintiff, that we take the liberty of quoting from it in extenso (609):"

Plaintiff then quoted from the same memorandum which is Exhibit A to his present moving papers.

14. With this as background, it is evident that, to avoid the obvious application of basic principles of collateral estoppel and res judicata, plaintiff's proposed amended complaint was drafted to make it appear that plaintiff has changed the thrust of this action from one based on a guarantee of the employment contract, which was purportedly breached, to one for alleged breach of the stock acquisition agreement. However, the employment contract and the stock acquisition agreement were executed as part of a single transaction. There would have been no employment contract in the absence of an acquisition, and there would have been no acquisition without an employment contract. Significantly, plaintiff annexes as an exhibit to the proposed amended complaint only the guaranty of the employment contract between himself and Lem, not the stock acquisition agreement or

the entire employment agreement, and never once refers to the specific paragraphs of any agreement he alleges was ever breached. A copy of the stock acquisition agreement is annexed hereto and marked Exhibit K and a copy of the entire employment contract is annexed hereto and marked Exhibit L. As if to underscore the identity of the State court action, all the Exhibits annexed to the proposed amended complaint are copies of exhibits which were marked in evidence in the State court action.

15. These similarities are further underscored by an analysis of the proposed amended complaint. The proposed new first cause of action asserts that plaintiff was wrongfully discharged "without cause" as a Director of Lem (Am. Comp. par. 5) and that, but for his discharge as Director, the remaining Directors of Lem (all employees of Twin Disc) would not have fired him for cause (Am. Comp. par. 8). His proposed second cause of action alleges that Twin Disc "devised a plan in bad faith to contrive an artificial and fraudulent excuse" to get Lem to discharge him (Am. Comp. par. 12) and then makes the incredible assertion that Twin Disc (and by implication, our firm) suborned perjury by "inducing Everett by promises of reward ... to testify falsely" (Am. Comp. par. 14).

16. But these "new" causes of action are a poor excuse for relitigating the propriety of plaintiff's discharge - an issue already fully litigated!

(A) First Cause of Action

Plaintiff emphasizes the fact that Twin Disc dismissed him as a Director of Lem. He suggests that, had he not been so discharged, he could have persuaded Lem's Board of Directors (who were all Twin Disc employees) not to discharge him (Am. Comp. par. 8). In addition, he urges that Lem's Board of Directors Meeting was illegal. But, Twin Disc's agreement to elect plaintiff to Lem's Board of Directors is contained in its guaranty of his employment contract (Ex. A to Am. Comp.), the same contract which he breached by his failure to perform competently and which was the subject of the State court action. Surely Twin Disc is entitled to rely in justification of plaintiff's removal as a Director of Lem on the same substantial evidence of plaintiff's shortcomings adduced at the State court trial to support Lem's discharge of plaintiff as an officer and employee. As set forth in the accompanying memorandum, I respectfully submit that plaintiff is estopped to argue the contrary. Apart from this, the question of whether the remaining Directors of Lem had authority to discharge him or wrongfully discharged him, or whether they would have done so if he were still on the Board, has already been adjudicated. At trial in the State court action, both the Minutes of the Shareholders Meeting and those of the Board of Directors Meeting were marked in evidence. (Trial

Exs. NN and OO). In that action, plaintiff urged upon the court and jury that the Board of Directors of Lem - as then constituted - lacked authority to discharge him. He cannot be heard to complain about that again.

(B) Second Cause of Action

As to the "plan" alleged in the second cause of action concerning Twin Disc's alleged attempts to get out of its guarantee, the plain fact is that Twin Disc poured money into Lem until October 1972, after plaintiff had fired Everett, when the situation was obviously hopeless. Indeed, plaintiff himself testified that -- despite the receipt of cash advances from Twin Disc in the amount of $482,000 -- Lem lost money throughout the period from the date of the acquisition to that of plaintiff's discharge. (App. 152-154). Twin Disc's President, John Batten, was cross-examined about the so-called "plan" (App. 390-393) and, as indicated above, plaintiff relied extensively on this excuse to try to avoid (and explain) his shortcomings.

17. The balance of plaintiff's proposed amended complaint repeats and realleges the first two causes of action and then alleges, without reference to specific sections of the stock acquisition agreement, that (1) the premature termination of the business of Lem deprived plaintiff of the opportunity to receive additional shares of stock of Twin Disc *if* Lem had shown a net profit (Third

Cause of Action); that Twin Disc was obligated to provide plaintiff with alternate employment since it closed Lem down (Fourth Cause of Action); that plaintiff was denied the option to buy Lem (Fifth Cause of Action); and that Twin Disc breached its duty to use its "best efforts" to keep Lem intact (Sixth Cause of Action).

18. Analysis of the proof in the State court action and of the stock acquisition agreement underscores the frivolousness of these claims and suggests why plaintiff failed to annex that agreement to his proposed amended complaint.

(A) Third Cause of Action

This proposed cause of action - like the third cause of action of the original Complaint - seeks damages for the additional shares of Twin Disc stock plaintiff would have received had Lem been profitable. But, by the terms of the stock acquisition agreement, at pages two and three thereof (Ex. K), plaintiff and Mr. Everett were entitled to shares of Twin Disc stock equal to 25% of pre-tax earnings of Lem "for each fiscal year after the deduction of accumulated operating losses incurred subsequent to April 18, 1968" (emphasis added). Since Lem's accumulated operating losses at the time of plaintiff's discharge exceeded $256,000, Lem would have to have pre-tax earnings equal to that amount before any bonus would have been payable. Thus, in order to qualify for the $233,000 plaintiff seeks in this cause

of action, Lem would have had to earn a pre-tax profit of over $1,250,000 in the less than three years remaining under the stock acquisition agreement. Inasmuch as under plaintiff's stewardship Lem lost an average of $66,000 per year, such a possibility is highly speculative, is not susceptible of proof and indeed is inconceivable. Moreover, Twin Disc was entitled to close down Lem without further obligation after the substantial losses it had sustained and the constant and growing evidence of plaintiff's mismanagement. Plaintiff apparently believes that, despite his ineptness, Twin Disc was obligated to continue pouring money in. In any event, the State court action is dispositive of the issue that defendant was justified in discharging plaintiff and closing Lem's business down. Consequently he cannot now assert the existence of any rights which ceased to exist with his lawful discharge and the termination of Lem's business.

(B) Fourth Cause of Action

Par. 23 of plaintiff's proposed amended complaint alleges that, as part of the stock acquisition agreement, Twin Disc guaranteed plaintiff employment in New York in the event that Lem closed down. This is simply not so. It is the guarantee of Lem's employment contract - the same contract the State court action determined plaintiff breached - which contains that language and only for the "life of the agreement". Since the State court action determined

that plaintiff breached the employment contract, and since Lem successfully defended against plaintiff's claims, that contract is at an end and plaintiff is estopped from alleging that Twin Disc breached its guaranty. Surely it would be absurd to require Twin Disc to find plaintiff alternate employment because Lem had discharged him with justification.

(C) Fifth Cause of Action

This proposed cause of action - like the third cause of action of the original Complaint - asserts that Twin Disc breached the stock acquisition agreement by not giving plaintiff an option to acquire Lem (Am. Comp. par. 26). But by letter dated October 9, 1972, Twin Disc gave plaintiff the option, and he failed to exercise it. A copy of this letter, marked in evidence by plaintiff at the State court trial, is annexed hereto as Exhibit M. At trial plaintiff testified that he did not accept the option. (App. 80). Thus plaintiff is simply wrong in asserting that he was not given the option. Moreover, as indicated above in connection with the proposed third cause of action, the decision in the State court action determined that the termination of Lem's business was justified.

(D) Sixth Cause of Action

This cause of action alleges that Twin Disc breached a best-efforts obligation to keep Lem in business. But, as

the evidence at trial showed, Twin Disc poured in $482,000 to keep Lem afloat. Only after it became clear that Lem's sucess under plaintiff's stewardship was impossible did Twin Disc close Lem down. A better faith effort is scarcely imaginable.

19. For the foregoing reasons, deponent respectfully submits that the proposed amended complaint offers no new claims or causes of action not already litigated in the State court action. But Twin Disc also objects to plaintiff's motion upon the ground of plaintiff's laches. Plaintiff deliberately misleads this Court and implies that he learned of the information upon which his motion is predicated after the trial in the State court action. The facts are contrary. In August 1972 - nearly two months prior to trial - defendant produced all the evidence upon which this motion is based. Ironically, this material was voluntarily produced in this action in August 1973 because plaintiff insisted on having discovery then, so that he could use it at trial in the State court action. Only now - when he has relied on this information, litigated and lost - does he seek to use it here. A clearer example of laches and seeking two bites out of an apple is hard to imagine. It would be of substantial prejudice at this late date to permit plaintiff to amend his Complaint to allege claims which either actually were tried at trial in the State court

action or which are totally dependent upon premises rejected at the trial of that action.

WHEREFORE, it is respectfully submitted that partial summary judgment dismissing the three causes of action alleged in the Complaint should be granted in all respects and that plaintiff's motion for leave to serve an amended and supplemental complaint should be denied.

Robert J. Kheel

Robert J. Kheel

Sworn to before me this
5th day of November, 1974

Gustav Miller

Notary Public

GUSTAV MILLER
Notary Public, State of New York
No. 31-7943535
Qualified in New York County
Commission Expires March 30, 1976

EXHIBITS ANNEXED TO FOREGOING AFFIDAVIT

EXHIBIT A - COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

. . . . . .

FRANK LOWELL,

Plaintiff,

-against-

TWIN DISC, INCORPORATED,

Defendant.

. . . . . .

The plaintiff, by SIDNEY S. BOBBÉ, for his complaint herein alleges as follows:-

FOR A FIRST CAUSE OF ACTION:

1. That plaintiff resides in the County of Suffolk, State of New York.

2. That defendant is a corporation incorporated under the laws of the State of Wisconsin, having its principal place of business in the City of Racine, Wisconsin.

3. That LEM INSTRUMENT CORPORATION (hereinafter "Lem") is a New York corporation with its principal place of business at Farmingdale, New York, and is a wholly-owned subsidiary of the defendant.

4. That on or about the 3rd day of July, 1968, the defendant duly executed a written agreement of guaranty whereby for a valuable consideration it guaranteed the performance by Lem of a certain employment contract made by Lem contemporaneously therewith and as an integral part thereof, whereby plaintiff was employed as general manager and president of Lem for a term of seven years commencing on July 3, 1968.

5. That plaintiff entered upon the performance of said contract, and duly performed all the terms and conditions there-

of agreed to be performed by him, until on or about the 9th day at Farmingdale, New York, of October, 1972, on which date, ~~he~~ wrongfully breached said employment and terminated the same without cause; and its action in so doing was with the active participation and full knowledge of the defendant, and with its consent.

6. That by reason of said breach, plaintiff has been damaged in the sum of upwards of Two Hundred and Fifty Thousand ($250,000.00) Dollars, which sum the defendant is obligated to pay to plaintiff in fulfillment of its aforesaid guaranty agreement.

FOR A SECOND CAUSE OF ACTION:

7. Plaintiff repeats the allegations of the first cause of action with the same force and effect as if herein set forth at length.

8. That pursuant to the terms of said employment contract it was provided that the annual salary to be paid to plaintiff during the term of the contract was $35,000.00, "with cost of living adjustments" such as were "accorded to employees" by the defendant, with a "beginning base salary of $26,120.00 per annum, plus the applicable cost of living adjustment."

9. On information and belief, that the aforesaid sum of $35,000.00 was computed on said base of $26,120.00 by adding thereto the cost of living adjustment based on the Index of such cost of living furnished by the United States Bureau of Labor Statistics, taking in the year 1950 as the base period.

10. On information and belief, that due to increases in the cost of living as reflected by said Labor Department index,

showing that such cost had increased for the years subsequent to December 31, 1968, the salary that became due and owing to plaintiff under said employment contract for the period subsequent to December 31, 1968 approximated the sum of $25,000.00 over and above the salary actually paid to plaintiff at the said rate of $35,000.00 per annum.

11. That no part thereof has been paid by Lem, and defendant has become obligated to pay the same under said agreement of guaranty.

12. That said employment contract also provided for the furnishing by Lem to plaintiff of specific fringe benefits, but Lem has failed and refused to make said benefits available to plaintiff, except that it has furnished him with a company automobile.

13. On information and belief, that the failure to furnish said fringe benefits to plaintiff up to the time of said wrongful discharge has caused further damage to the plaintiff in the sum of approximately $25,000.00, for which defendant is liable under its said guaranty agreement.

14. That plaintiff has been damaged by reason of the facts set forth in this cause of action in the sum of Fifty Thousand ($50,000.00) Dollars.

FOR A THIRD CAUSE OF ACTION:

15. Plaintiff repeats the allegations of the first cause of action with the same force and effect as if herein set forth at length.

16. That on July 3, 1968, at the time said employment contract and said guaranty agreement were executed, defendant executed a certain agreement between it on the one hand and plaintiff and one ROBERT EVERETT (hereinafter Everett) on the

other, which agreement was designated a stock acquisition agreement.

17. That by the terms of that agreement, plaintiff and Everett were designated as "shareholders", and therein they agreed to transfer to the defendant all the issued and outstanding shares of Lem stock, of which two-thirds were owned by plaintiff and the remaining one-third by Everett, in exchange for shares of defendant's voting common stock having a market value of $150,000.00; and it further provided that two-thirds of the latter stock would be issued to the plaintiff and the other one-third to Everett.

18. That said exchange of stock was duly made, whereby defendant acquired all the stock of Lem, and plaintiff acquired his said proportion of the stock of defendant.

19. That said agreement further provided that additional shares of defendant's stock would be purchased by the defendant and delivered to plaintiff if, during any of the seven fiscal years, commencing with the fiscal year ending June 30, 1969, the business of Lem should show a net profit, computed as set forth in said agreement, in which event additional shares of defendant to the value of twenty-five per cent of such net profit would be delivered to plaintiff and Everett, plaintiff to receive two-thirds thereof; provided, however, that such additional purchase of stock by the defendant would not exceed $350,000.00.

20. Said agreement further provided, in paragraphs 10 and 11 thereof, as follows:-

> "10. It is agreed that if at any time during the period ending June 30, 1975, TWIN DISC desires to dissolve LEM, or to sell all or any of its assets other

than in the ordinary course of business or to transfer ownership of any part of its interest in LEM, the SHAREHOLDERS shall be given notice thereof and shall thereupon have the option exercisable at any time within six (6) months following such notice to acquire from TWIN DISC all of the then outstanding shares of LEM at a price and upon terms not less favorable than the terms of such contemplated transaction.

"11. TWIN DISC agrees that the principal business location of LEM shall remain in New York City or Long Island and shall not be removed therefrom without the consent of SHAREHOLDERS who then remain a Director or employe of LEM."

21. That on October 9, 1972, at the time and place when and where plaintiff and Everett were wrongfully discharged as officers and employes of Lem, the defendant, in breach of said stock acquisition agreement, caused to be served on plaintiff and Everett a letter of the same date, signed by a duly authorized agent of the defendant, a copy of which is annexed hereto as Exhibit A.

22. That in further breach of said agreement, defendant proceeded immediately thereafter to sell and dispose of all the assets of Lem other than in the ordinary course of its business, and to terminate Lem's operations, thereby depriving plaintiff of the option contained in said agreement, as well as of the opportunity to receive additional shares of stock of the defendant to which plaintiff might have become entitled had the profits of Lem so warranted.

23. That by reason of the premises, plaintiff has been further damaged in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

WHEREFORE plaintiff demands judgment against the defendant on the first cause of action in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars; on the second cause of action

in the sum of Fifty Thousand ($50,000.00) Dollars; and on the third cause of action in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, or in the aggregate, in the sum of Five Hundred and Fifty Thousand ($550,000.00) Dollars, together with appropriate interest and the costs and disbursements of this action.

SIDNEY S. BOBB,
Attorney for Plaintiff,
36 West 44th Street,
New York, N.Y. 10036
Tel.: MU 2-7218.

LEM INSTRUMENT CORPORATION
SUBSIDIARY OF TWIN DISC INCORPORATED
20 SARAH DRIVE • FARMINGDALE, NEW YORK 11735 • TEL: 516 293-7241

October 9, 1972

To: Mr. Frank Lowell
Mr. Robert Everett

Subject: Offer to Terminate the Operation of LEM Instrument Corporation by Twin Disc, Incorporated, the sole shareholder.

This will confirm the offer to sell the assets of LEM Instrument Corporation to the original principals, Mr. Frank Lowell and Mr. Robert Everett made by Twin Disc, Incorporated in the office of Mr. Frank Lowell on Wednesday 27 September 1972.

The offer is to sell the assets only to the two principals, change the company name and transfer the name "LEM" to the two principals in exchange for that number of shares of "Twin Disc" equal to the sale price, to be based upon the mid-point value between the "asked" and "bid" quotes in the Wall Street Journal on the day of agreement.

The asset value is established from the LEM Balance Sheet as at 31 August 1972 as follows:

Accounts Receivable - Trade	$3693.91	
" " - Deposit	875.00	
		$ 4568.91
Inventory	-	53376.22
Prepaid Insurance	-	120.00
Machinery & Equipment (net)	-	9243.59
Patent	-	1.00
Deferred Research & Development	-	88297.92
		$155607.64

Further, in consideration for an immediate release from employment contracts held by the two principals, and guaranteed by Twin Disc, and all other terms contained in the original purchase agreement, Twin Disc will allow the equivalent of one year of salary for each of the two principals ($35,000.00 and $20,000.00 respectively) reducing the sale price to a net of $100,000.00.

Sincerely,

Wilton B. Gibson

Wilton B. Gibson
Chairman of the Board

INDIVIDUAL VERIFICATION

STATE OF NEW YORK,
CITY OF NEW YORK
COUNTY OF NEW YORK } ss.:

FRANK LOWELL , being duly sworn, deposes and says that he is the plaintiff in the within action; that he has read the foregoing and knows the contents thereof; that the same is true to h is own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

Sworn to before me, this 26th day of October, 197 2.

Frank Lowell

MARY REILLY
Notary Public, State of New York
No. 41-8534669
Qualified in Queens County
Certificate filed with N.Y. County Clerk
Commission Expires March 30, 1974

CORPORATION VERIFICATION

STATE OF NEW YORK,
CITY OF
COUNTY OF } ss.:

, being duly sworn, deposes and says that he is the of the herein that he has read the foregoing and knows the contents thereof, and that the same is true to h own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the is because the said is a corporation, and deponent an officer thereof, to wit its

Sworn to before me, this
day of 197

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
CITY OF
COUNTY OF } ss.:

being duly sworn, deposes and says, that he is over the age of years. That on the day of 197 at No. in the he served the foregoing upon by delivering to and leaving personally with said a true copy thereof.

Deponent further says, that he knew the person served as aforesaid, to be the person mentioned and described in said as the therein.

Sworn to before me this
day of 197

AFFI OF SERVICE BY MAIL

STATE OF NEW YORK
CITY OF
COUNTY OF } ss.:

being duly sworn, deposes and says that he is the attorney for the above named herein. That on the day of 197 he served the within upon the attorney for the above named by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Post-Office—a Branch Post-Office—a Post-Office Box regularly maintained by the United States Government at in said County of directed to said attorney for the at No. N. Y., that being, the address within the State designated by h for that purpose upon the preceding papers in this action, or the place where h then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of years.

Sworn to before me this
day of 197

EXHIBIT B - AMENDED ANSWER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

FRANK LOWELL,

Plaintiff,

-against-

TWIN DISC, INCORPORATED,

Defendant.

JM

72 Civil 1582

AMENDED ANSWER

----------X

Defendant, by its attorneys, WILLKIE FARR & GALLAGHER, answering:

AS TO THE FIRST CAUSE OF ACTION

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Admits the allegations contained in paragraphs 2 and 3 of the Complaint.

3. Upon information and belief denies each and every allegation contained in paragraph 4 of the Complaint, except it admits that on July 3, 1968, it entered into an agreement with plaintiff, and respectfully refers to said agreement for its exact terms and conditions.

4. Upon information and belief denies each and every allegation contained in paragraphs 4, 5 and 6 of the Complaint, and specifically denies that plaintiff performed all of the conditions on his part to be performed, and avers that plaintiff, inter alia, failed: (1) to

achieve the level of performance anticipated for Lem in the "Operation Plans", (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company, and (11) to provide proper leadership for Lem. 64a

AS TO THE SECOND CAUSE OF ACTION

5. For its answer to the allegations contained in paragraph 7 of the Complaint, repeats and realleges each and every allegation contained in paragraphs 1 through 4 of this Answer with the same force and effect as if herein again set forth at length.

6. Upon information and belief denies each and every allegation contained in paragraph 8 of the Complaint, except that it admits that on July 3, 1968, it entered into an agreement with plaintiff, and respectfully refers to said agreement for its exact terms and conditions.

7. Denies knowledge or information sufficient to form a belief as to the truth of paragraphs 9 and 10 of the Complaint.

8. Admits that it has not paid the sum of $25,000 referred to by reference in paragraph 11 of the Complaint.

Upon information and belief denies each and every allegation contained in paragraph 12 of the Complaint, except that it admits that on July 3, 1968, it entered into an agreement with plaintiff and respectfully refers to said agreement for its exact terms and conditions. 65a

10. Upon information and belief denies each and every allegation contained in paragraphs 13 and 14 of the Complaint.

AS TO THE THIRD CAUSE OF ACTION

11. For its answer to the allegations contained in paragraph 15 of the Complaint, repeats and realleges each and every allegation contained in paragraphs 1 through 5 of its Answer with the same force and effect as if herein again set forth at length.

12. Denies each and every allegation contained in paragraphs 16 through 20 of the Complaint, except admits that it entered into an agreement with plaintiff, and respectfully refers to said agreement for its exact terms and conditions.

13. Denies each and every allegation contained in paragraph 21 of the Complaint, except, on information and belief, admits that on October 9, 1972, letters were delivered to plaintiff and Everett.

14. Denies each and every allegation contained in paragraphs 22 and 23 of the Complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE TO THE FIRST AND SECOND CAUSES OF ACTION

15. Defendant avers that plaintiff was discharged for cause and therefore defendant has no liability to plaintiff.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE TO THE FIRST AND SECOND CAUSES OF ACTION

16. Defendant avers that plaintiff was discharged because he had not faithfully and diligently performed the duties of his employment.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE TO THE FIRST AND SECOND CAUSES OF ACTION

17. It was not the intention of the parties to the agreement in suit that plaintiff would be compensated by defendant in the event that his services were unsatisfactory and his services were in fact unsatisfactory.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE TO THE FIRST AND SECOND CAUSES OF ACTION

18. This action is premature in that a separate action is now pending in the Supreme Court of the State of New York, County of Suffolk, in which the plaintiff herein is the plaintiff and Lem Instrument Corp. is defendant, in which the issue in suit is whether plaintiff was wrongfully discharged from his employment with Lem Instrument Corp.

AS AND FOR A FIFTH SEPARATE AND PARTIAL DEFENSE TO THE FIRST AND SECOND CAUSES OF ACTION

19. The plaintiff's action is premature insofar as it seeks damages for services to have been rendered in the future.

AS AND FOR A SIXTH SEPARATE AND PARTIAL DEFENSE TO THE FIRST AND SECOND CAUSES OF ACTION

20. Plaintiff has failed to mitigate his alleged damages.

AS AND FOR A SEVENTH SEPARATE AND COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

21. Plaintiff has waived whatever rights to "cost of living benefits" he may have had under the agreements by deliberately refusing to pay same to himself or other employees of Lem Instrument Corp. in order to reduce the operating deficits of Lem Instrument Corp.

AS AND FOR AN EIGHTH SEPARATE AND COMPLETE DEFENSE TO THE THIRD CAUSE OF ACTION

22. Lem has not been dissolved and its assets have not been sold, other than in the ordinary course.

AS AND FOR A NINTH SEPARATE AND COMPLETE DEFENSE TO THE THIRD CAUSE OF ACTION

23. Defendant has tendered to plaintiff the right to acquire its shares of stock in Lem Instrument Corp.

AS AND FOR A TENTH SEPARATE AND COMPLETE DEFENSE TO ALL CAUSES OF ACTION AND COUNTER-CLAIM AND SET-OFF

24. Defendant is a Wisconsin corporation engaged in the manufacture of power transmission equipment primarily for sale to original equipment manufacturers and maintains its principal place of business and office at Racine, Wisconsin, in the Eastern District of Wisconsin.

25. On information and belief plaintiff, Frank Lowell, is a resident and citizen of the State of New York residing therein at 25 Alpine Way, Huntington Station, Suffolk County, New York, and is an engineer and prior hereto was a corporate executive.

26. LEM Instrument Corporation (LEM) is and was at all times material a New York corporation with its principal place of business at Farmingdale, Long Island, New York, and it was engaged in the manufacture of electric friction clutches and brakes, and analog to digital shaft encoders.

27. On or about July 3, 1968 plaintiff and LEM entered into an employment agreement which defendant guaranteed. A copy of said agreement is annexed hereto and marked Exhibit A.

28. Under the terms of said agreement the plaintiff agreed to serve as President and General Manager of LEM for the term of seven years commencing January 3, 1968 and that he would faithfully and diligently perform the duties of his employment, engaging in no business activities detrimental to the business interests of LEM or Twin Disc.

29. Although plaintiff has been paid the 69a
compensation which said agreement contemplated from the date thereof, he failed and neglected to perform his duties contemplated under said agreement and pursuant to the understandings of the parties arrived at during the negotiations. That he wholly failed and neglected to develop the market for the company's products; that he failed and neglected to develop additional and new products which would be vendable by the company, and he engaged in activities within the operation of the company which were detrimental to its business interests and therefore the interests of Twin Disc.

30. Incorporated into the employment contract were certain forecasts of projected sales and earnings; that such incorporation constituted a representation that said forecasted sales and profits were reasonable and were based on the knowledge or conclusions of the plaintiff, and that they had reasonable support, which would logically lead to the conclusion that they were attainable goals, and that said representations were a part of the inducement to the defendant to enter into the contract with the plaintiff and the employment agreement between LEM and Lowell.

31. That said forecasts were unreasonable, supported by no adequate knowledge or information and were purely speculative. That at no time since July, 1968 have the sales of LEM ever approached even the projected sales for the first year, and said company never realized any profit on its operations, operating constantly at a substantial loss.

...hat by reason of the foregoing the defendant has been damaged in an amount presently undeterminable but which the defendant believes will not exceed the sum of $250,000.

WHEREFORE, defendant demands judgment on its counterclaim not in excess of $250,000 and judgment dismissing the Complaint, together with the costs and disbursements of this action.

WILLKIE FARR & GALLAGHER
Attorneys for Defendant

By _____
(A Member of the Firm)
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 248-1000

EMPLOYMENT CONTRACT

Agreement made this 3rd day of July, 1968 by and between LEM INSTRUMENT CORPORATION (hereinafter called "LEM"), a New York corporation, and FRANK LOWELL (hereinafter called "Lowell") of Farmingdale, New York,

WHEREAS, all of the capital stock of LEM is being acquired by TWIN DISC, INCORPORATED (hereinafter called "TWIN DISC"), a Wisconsin corporation, pursuant to a Stock Acquisition Agreement between TWIN DISC, Lowell, and Robert Everett, and, which will result in LEM operating as the wholly owned subsidiary of TWIN DISC, and

WHEREAS, Lowell has served as President of LEM, and LEM desires that his services continue to be available to LEM,

NOW, THEREFORE, in consideration of the mutual covenants, conditions and agreements herein, it is agreed as follows:

1. Lowell is herewith employed by LEM as General Manager and President of the Company for the term of seven (7) years beginning as of the date of this agreement, as long as he shall faithfully and diligently perform the duties of his employment and shall engage in no activities which are detrimental to the business interests of LEM or TWIN DISC. LOWELL agrees to devote his full time and his best efforts in the furtherance and interests of LEM. It is also anticipated that Lowell will be elected as Director of the Corporation without additional compensation. Full time as used herein shall mean that time customarily devoted as President, Director and General Manager, by other such executives with comparable education, training and experience who are employed by comparable firms.

Exhibit A

2. LEM agrees to compensate Lowell for his services hereunder on the following bases:

a. An annual salary of $35,000.00 payable in equal semi-monthly installments commencing April 18, 1960 with cost of living adjustments in the same manner as said cost of living adjustments are accorded to employes by TWIN DISC. Said salary includes a beginning base salary of $26,120.00 per annum plus the applicable cost of living adjustment.

b. Annexed hereto as Schedule A is a forecast of sales and profits of LEM for the seven (7) year term of this contract. If the after-tax performance of LEM shall exceed the forecasted figures at the end of the third and fifth years of this agreement, the basic salary for each ensuing year otherwise provided under paragraph a. above, shall be proportionately increased, provided, however, that no such increase shall result in the basic salary exceeding that of the average base salary (currently $36,640.00) for the five top TWIN DISC Vice-Presidents (not including any Executive Vice-President).

c. Annual bonuses determined by the Board of Directors of LEM out of after-tax profits in excess of twelve percent (12%) of LEM capital plus accumulated earnings without reduction for accumulated losses shall also be paid, provided that such bonus shall not exceed twenty percent (20%) of the salary for the applicable period.

3. Lowell acknowledges that as between Lowell and LEM, LEM is the owner of and has the unencumbered right to use the ideas, designs, techniques and know-how presently used by it and developed by Lowell for use in the production, sale, use or distribution of its products. Any invention, improvements or development made or originated by Lowell at any time during the life of this agreement, and in any way relating to the matters aforesaid or to the manufacture or use of the company's products, shall be and remain the property of LEM and, if deemed appropriate to its protection by LEM, Lowell shall execute such documents of assignment thereof as LEM may request without any provision for royalty or other payment of any kind. Further, Lowell will, at LEM's request, cooperate with it in filing and obtaining any patents, copyrights, or similar protection that may be available for such developments.

4. In consideration of this employment contract, and the payment to him of the compensation provided for his service, Lowell agrees that during the life of this agreement and for the period of one (1) year after its termination (except for default or breach by LEM), he will not, directly nor indirectly, or as employe, consultant, agent, representative or otherwise nor as owner, partner, joint venturer or shareholder of more than five percent (5%) of the stock of any company, engage in any activity in competition with LEM, TWIN DISC, or the successors to the business of either. For these purposes an enterprise shall not be deemed in competition with TWIN DISC or LEM if it is engaged in the business of manufacturing or

selling components for use only in total machines or equipment manufactured, built or assembled by such enterprise, (rather than in the manufacture of such components primarily for sale to others) in the following fields:

Precision Clutches and Brakes;

Automatic Tensioning Systems;

Analog to Digital Shaft Encoders;

Precision Speed Reducers;

Digital Sensors;

Remote Digital Control Systems; and

Automatic Density Control Devices.

On termination of this agreement, Lowell shall be offered a one-year consultancy agreement at compensation equal to one-half the compensation, without bonus, for the final year, following which the restrictions on competition shall terminate.

5. Lowell agrees that the knowledge he presently has, or may obtain in the course of his employment, with respect to the conduct and details of the business, processes, formulae, machinery, and arts, which are secret, used in the manufacturing of its products will not be imparted to anyone whomsoever other than the officers or employes of LEM or the representatives of TWIN DISC, or the customers of either in the normal conduct.

of their business, and that if he violates the terms of this provision or of Paragraph 4. above, LEM, or its successor, shall be entitled to an injunction obtained in any court of competent jurisdiction restraining him and each and every other person concerned therein from the continuance of such breach.

6. In addition to the compensation hereinabove provided, it is agreed that there shall be made available to Lowell fringe benefits on the basis comparable to those afforded employes of TWIN DISC charged with similar duties and receiving similar compensation. If feasible, said benefits may be provided directly by TWIN DISC under such plans for benefits made available to its employes, but with the cost thereof charged to LEM in such event. The areas of such benefits are:

a. Management Group Consulting and Widows Benefits Arrangements

b. Keyman Group Insurance (Life) with premiums chargeable to you as salary

c. Group Accident, Health and Travel Insurance

d. Retirement Plan

e. A company automobile with appropriate insurance therefor

f. Option to acquire Twin Disc stock on the same bases as the same may be offered Twin Disc's top five Vice-Presidents (other than Executive Vice-President).

7. In the event of the requirement of any notice

provided for under this instrument, the same shall be deemed effectively given by certified mail, return receipt requested, in the case of TWIN DISC, addressed as follows:

Twin Disc, Incorporated
1328 Racine Street
Racine, Wisconsin 53403

Attention: Robert T. Howell;

in the case of notice to Lowell to:

Frank Lowell
25 Alpine Way
Huntington Station, New York.

8. This agreement shall be binding upon the heirs, representatives, successors or assigns of the parties hereto. The agreement shall be construed in accordance with the laws of the State of New York, and in the event it shall be determined that any provision above is violative of any law and unenforceable, the remaining portions shall nonetheless be of full force and effect, unless inconsistent with the agreement with such clauses removed.

IN WITNESS WHEREOF, these presents have been executed by the parties hereto as of the day and year first above written.

LEH INSTRUMENT CORPORATION

By /s/ Robert A. Everett
Its ~~Vice President~~

Attest:

By /s/ Robert A. Everett
Its Secretary

/s/ Frank Lowell
FRANK LOWELL

For valuable consideration, TWIN DISC, INCORPORATED herewith guarantees performance of the terms of this agreement to be performed by LEM, and to vote its share of LEM Stock to elect Lowell to LEM's Board of Directors during the life of this agreement. In the event LEM is either liquidated or disposed of, either through sale of assets or through sale of controlling interest in its stock, TWIN DISC will make available to Lowell employment in New York City or Long Island on a comparable schedule of compensation (other than the additives provided under Paragraph 2.c. of the foregoing agreement), provided, however, that no part of this guarantee shall be effective in the event LEM or its assets are disposed of to Lowell and/or Everett, or to their nominees.

DATED at Racine, Wisconsin, this 3rd day of July, 1968.

TWIN DISC, INCORPORATED

By /s/ Wilton B. Gibson

Its Vice-President

(Corporate Seal)

Attest:

By /s/ R. T. Howell

Its Secretary

Schedule "A"

LEX Instrument Corporation

Letter of Intent

21 March 1968

FORECASTED SALES AND PROFITS

Year	Projected Sales	Proj. Profit Rate Before Tax	BEFORE ~~After~~ Tax Annual Net Profit
1	$ 300,000.00	17.0	$ 51,000.00
2	600,000.00	16.5	99,000.00
3	1,000,000.00	16.0	160,000.00
4	1,400,000.00	15.5	217,000.00
5	1,800,000.00	15.0	270,000.00
6	2,200,000.00	14.5	319,000.00
7	2,600,000.00	14.0	364,000.00

EXHIBIT C - COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

. . . . . .

FRANK LOWELL,

Plaintiff,

-against-

LEM INSTRUMENT CORPORATION,

Defendant.

. . . . . .

The plaintiff, by SIDNEY S. BOBBÉ, for his complaint herein alleges as follows, on information and belief:-

FOR A FIRST CAUSE OF ACTION:

1. That plaintiff resides in the County of Suffolk, State of New York.

2. That defendant is a domestic corporation, having its principal place of business at Farmingdale, New York.

3. That on or about the 3rd day of July, 1968, the plaintiff and the defendant duly executed a written employment contract whereby plaintiff was employed as defendant's general manager and president for a term of seven years commencing on July 3, 1968.

4. That plaintiff entered upon the performance of said contract, and duly performed all the terms and conditions thereof agreed to be performed by him, until on or about the 9th day of October, 1972, on which date, at Farmingdale, New York, defendant wrongfully breached said contract and terminated plaintiff's employment.

5. That by reason of said breach, plaintiff has been damaged in the sum of upwards of Two Hundred and Fifty Thousand

FOR A SECOND CAUSE OF ACTION:

6. Plaintiff repeats the allegations of the first cause of action with the same force and effect as if herein set forth at length.

7. That pursuant to the terms of said employment contract, it was provided that the annual salary to be paid to plaintiff during the term of the contract was $35,000.00, "with cost of living adjustments" such as were "accorded to employees" by Twin Disc Incorporated, a Wisconsin corporation, with a "beginning base salary of $26,120.00 per annum, plus the applicable cost of living adjustment."

8. On information and belief, that the aforesaid sum of $35,000.00 was computed on said base of $26,120.00 by adding thereto the cost of living adjustment based on the index of such cost of living furnished by the United States Bureau of Labor Statistics, taking the year 1950 as the base period.

9. On information and belief, that due to increases in the cost of living as reflected by said Labor Department index, showing that such cost had increased for the years subsequent to December 31, 1968, the salary that became due and owing to plaintiff under said employment contract for the period subsequent to December 31, 1968 approximated the sum of $25,000.00 over and above the salary actually paid to plaintiff at the said rate of $35,000.00 per annum.

10. That no part thereof has been paid.

11. That said employment contract also provided for the furnishing by defendant to plaintiff of specific fringe benefits, but defendant has failed and refused to make said benefits available to plaintiff, except that it has furnished him with a company automobile.

12. On information and belief, that the failure to

furnish said fringe benefits to plaintiff up to the time of said wrongful discharge has caused further damage to the plaintiff in the sum of approximately $25,000.00.

13. That plaintiff has been damaged by reason of the facts set forth in this cause of action in the sum of Fifty Thousand ($50,000.00) Dollars.

WHEREFORE plaintiff demands judgment against the defendant on the first cause of action in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars; on the secon cause of action in the sum of Fifty Thousand ($50,000.00) Dollars, or in the aggregate, in the sum of Three Hundred Thousand ($300,000.00) Dollars, together with appropriate interest and the costs and disbursements of this action.

SIDNEY S. BOBBÉ,
Attorney for Plaintiff,
36 West 44th Street,
New York, N.Y. 10036
Tel.: MU 2-7218.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF SUFFOLK

- x

FRANK LOWELL, :

Plaintiff, :

-against- : AMENDED VERIFIED ANSWER

LEM INSTRUMENT CORP., :

Defendant :

- x

Defendant answering:

AS TO THE FIRST CAUSE OF ACTION

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.

2. Admits the allegations contained in paragraph 2 of the Complaint.

3. Upon information and belief denies each and every allegation contained in paragraph 3 of the Complaint, except it admits that on July 3, 1968, it entered into an agreement with plaintiff, and respectfully refers to said agreement for its exact terms and conditions.

4. Upon information and belief denies each and every allegation contained in paragraphs 4 and 5 of the Complaint.

AS TO THE SECOND CAUSE OF ACTION

5. For its answer to the allegations contained in paragraph 6 of the Complaint, repeats and realleges each and every allegation contained in paragraphs 1 through 4 of

this Answer with the same force and effect as if herein again set forth at length.

6. Upon information and belief denies each and every allegation contained in paragraph 7 of the Complaint, except that it admits that on July 3, 1968, it entered into an agreement with plaintiff, and respectfully refers to said agreement for its exact terms and conditions.

7. Denies knowledge or information sufficient to form a belief as to the truth of paragraphs 8 and 9 of the Complaint.

8. Admits that it has not paid the sum of $25,000 referred to by reference in paragraph 10 of the Complaint.

9. Upon information and belief denies each and every allegation contained in paragraph 11 of the Complaint, except that it admits that on July 3, 1968, it entered into an agreement with plaintiff and respectfully refers to said agreement for its exact terms and conditions.

10. Upon information and belief denies each and every allegation contained in paragraphs 12 and 13 of the Complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE

11. Defendant denies that plaintiff duly performed all of the conditions precedent of the agreement described in the Complaint herein, required on his part to be performed,

and avers that plaintiff, inter alia, failed: (1) to achieve the level of performance anticipated for Lem in the "Operation Plans", (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company, and (11) to provide proper leadership for Lem.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE

12. Defendant avers that plaintiff was discharged for cause in that he failed, inter alia: (1) to achieve the level of performance anticipated for Lem in the "Operation Plans", (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company and (11) to provide proper leadership for Lem.

AS AND FOR A THIRD SEPARAT
AND COMPLETE DEFENSE

13. Defendant avers that plaintiff was discharged because he had not faithfully and diligently performed the duties of his employment in that he, inter alia, failed: (1) to achieve the level of performance anticipated for Lem in the "Operation Plans", (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company, and (11) to provide proper leadership for Lem.

AS AND FOR A FOURTH
SEPARATE AND PARTIAL
DEFENSE

14. The plaintiff's action is premature insofar as it seeks damages for services to have been rendered in the future.

AS AND FOR A FIFTH
SEPARATE AND PARTIAL
DEFENSE

15. Plaintiff has failed to mitigate his alleged damages.

WHEREFORE, defendant demands judgment dismissing the Complaint, together with the costs and disbursements of this action.

WILLKIE FARR & GALLAGHER
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 248-1000

STATE OF ~~NEW YORK~~ TEXAS)
COUNTY OF ~~NEW YORK~~ HIDALGO) ss.:

WILTON B. GIBSON, being duly sworn, deposes and says:

That deponent is Chairman of the Board of Lem Instrument Corporation, the defendant herein; that he has read the foregoing Amended Verified Answer and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes them to be true.

This verification is made by deponent because defendant is a corporation and deponent is an officer thereof, to wit: Chairman of the Board. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: communication with other employees, books and records of defendant corporation.

Wilton B Gibson
Wilton B. Gibson

Sworn to before me this
20th day of February, 1973.

Leland F. Byers
Notary Public
LELAND F. BYERS

THE STATE OF TEXAS
COUNTY OF HIDALGO

I, Santos Saldoña, Clerk of the County of Hidalgo, Clerk of the County Court, being a Court of Record, do hereby certify that LELAND F. BYERS whose name is subscribed to the certificate of proof, acknowledgment or affidavit of the annexed instrument in writing, was at the time of taking such proof, acknowledgment or affidavit, a NOTARY PUBLIC in and for said County, duly commissioned and sworn and authorized to take and certify the same and authorized by the Laws of said State to take the acknowledgments and proofs of deeds or conveyance for land, tenements or hereditaments in said State of Texas; and further, that I am well acquainted with the hand writing of such Notary Public and verily believe the signature to the said certificate or proof, acknowledgment or affidavit is genuine.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said County Court of Hidalgo County, Texas, this the 20th day of February, 1973

Clerk

By _____ Deputy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

FRANK LOWELL, : Cal. No. 41532

Plaintiff, :Index No. 73-1733

-against- : JUDGMENT

LEM INSTRUMENT CORP., : Entered Oct. 29 1973 @ 11:41 P.M.

Defendant. :

----------X

The above-entitled action having been regularly brought on for trial at a Trial Term, Part VI, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the County Courthouse, Riverhead, New York, on the 9th, 10th, 11th and 12th days of October, 1973, before Mr. Justice John F. Scileppi, sitting with a jury, and both parties having appeared by their respective attorneys, and the jury having unanimously rendered its verdict for defendant, Lem Instrument Corp., on October 12, 1973, dismissing the Complaint, and the Court having denied plaintiff's motion to set aside the verdict, and the Court having directed that defendant have its costs,

NOW, on motion of WILLKIE FARR & GALLAGHER, attorneys for defendant, it is

ADJUDGED, that the Complaint in the above-entitled action be, and the same hereby is, dismissed on the merits and that the defendant Lem Instrument Corp.,

whose address is 20 Sarah Drive, Farmingdale, New York, recover of the plaintiff, Frank Lowell, whose address is 25 Alpine Way, Huntington Station, New York, the sum of $ 447 00 costs, as taxed in this action, and that the defendant have execution therefor.

Riverhead, New York
October 29, 1973.

/s/ Lester M Albertson
Clerk

Filed: Oct. 29, 1973
Lester M. Albertson
Clerk

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EXHIBIT F - ORDER OF AFFIRMANCE

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on **April 29, 1974.**

HON. FRANK A. GULOTTA, *Presiding Justice*
[redacted]
HON. HENRY J. LATHAM
[redacted]
HON. JOHN P. COHALAN, JR.
[redacted]
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER
} *Associate Justices*

Frank Lowell,

Appellant,

v.

Lem Instrument Corp.,

Respondent.

} Order on Appeal from Judgment—Civil Action or Proceeding

In the above entitled cause, the above named **Frank Lowell, plaintiff,** having appealed to this court from a judgment of the **Supreme Court, Suffolk** County, [redacted] **entered October 29, 1973;**

and the said appeal having been **argued** by **Sidney S. Bobbe,** Esq., of counsel for the appellant, and **argued** by **Mark F. Hughes,** of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby **unanimously affirmed, with costs.**

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

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87150-2.

EXHIBIT G - ORDER OF APPELLATE DIVISION DENYING APPEAL

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 13, 1974.

HON. FRANK A. GULOTTA, *Presiding Justice*
HON. [illegible]
HON. [illegible]
HON. HENRY J. LATHAM
HON. [illegible]
HON. JOHN P. COHALAN, JR.
HON. [illegible]
HON. [illegible]
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER
Associate Justices

Frank Lowell,

Appellant,

v.

Lem Instrument Corp.,

Respondent.

Order on Motion to Reargue Appeal or to Appeal to the Court of Appeals

In the above entitled cause, the above named appellant having moved for reargument of appeal from a judgment of the Supreme Court, Suffolk County, entered October 29, 1973, [illegible] for leave to appeal to the Court of Appeals; from an order of this court dated April 29, 1974, which determined said appeal,

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied, with $20 costs.

Enter: Irving N. Selkin

Clerk of the Appellate Division

No. 2055

Frank Lowell, appellant, v. Lem Instrument Corp., respondent.

6/13/74

Motion by appellant for reargument of appeal from a judgment of the Supreme Court, Suffolk County, entered October 29, 1973, or for leave to appeal to the Court of Appeals from an order of this court dated April 29, 1974, which determined said appeal.

Motion denied, with $20 costs.

GULOTTA, P.J., LATHAM, COHALAN, BENJAMIN and MUNDER, JJ., concur.

EXHIBIT H - ORDER OF COURT OF APPEALS DENYING PERMISSION TO APPEAL

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eleventh *day of* September *A. D. 1974.*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

---

2 Mo. No. 690
Frank Lowell,
Appellant,
vs.
Lem Instrument Corp.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

James M. Flavin
Clerk

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EXHIBIT I - NOTICE OF MOTION WITH SUPPORTING PAPERS AND BRIEF

Court of Appeals

State of New York

FRANK LOWELL,

Plaintiff-Appellant,

-against-

LEM INSTRUMENT CORP.,

Defendant-Respondent.

NOTICE OF MOTION WITH SUPPORTING PAPERS AND BRIEF

SIDNEY S. BOBBE
Attorney for Plaintiff-Appellant
25 West 54th Street
New York, N.Y. 10019
CI 6-2885

SAMUEL LAWRENCE BRENNGLASS,
Of Counsel

OFFICE RECORD

WILLKIE, FARR & GALLAGHER
Attorneys for Defendant-Respondent
1 Chase Manhattan Plaza
New York, N.Y. 10005
248-1000

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COURT OF APPEALS OF THE STATE OF NEW YORK

FRANK LOWELL,

Plaintiff-Appellant

-against-

LEM INSTRUMENT CORP.

Defendant-Respondent

NOTICE OF MOTION FOR LEAVE TO APPEAL

SIRS:

Please take notice that upon the annexed affirmation of Sidney S. Bobbe and upon the annexed brief the undersigned will move this Court at the next motion day thereof more than seven days after notice of the motion is served to be held at the Court House in the City of Albany, New York, at 2:00 P.M. of that day for an order pursuant to CPLR 5602 (a), granting to the above-named plaintiff-appellant permission to appeal to this Court from the order of the Appellate Division of the Supreme Court, Second Department, entered on the 29th day of April, 1974, which unanimously affirmed a judgment of the Supreme Court, Suffolk County entered on October 29th, 1973, and for such other and further relief as to the Court may seem just.

Yours, etc.,

SIDNEY S. BOBBE
Attorney for Plaintiff-Appellant
25 W. 54th Street
New York, N.Y. 10019
Tel. 246-2885

TO:

WILLKIE, FARR & GALLAGHER
1 Chase Manhattan Plaza
New York, N.Y. 10005

AFFIRMATION OF SIDNEY S. BOBBE IN SUPPORT OF MOTION

(SAME TITLE)

Sidney S. Bobbe, attorney for plaintiff-appellant, hereby affirms to this Court, under penalty of perjury:

1. That this is an action to recover damages for breach of a written contract of employment of plaintiff as president and general manager of defendant. It was entered into on July 3, 1968, and it was to run for seven years at a salary of $35,000. per annum, plus a cost of living increase, with an additional year as a consultant at half pay.

2. After four years, on October 9, 1972, plaintiff's services were terminated, allegedly for "cause."

3. The first cause of action seeks to recover the damages suffered as a result of the discharge, and the second cause of action seeks to recover the unpaid cost-of-living increment amounting to $18,220.

4. The first defense in the answer claimed that the plaintiff had failed to perform eleven conditions precedent. The second and third defenses alleged that the plaintiff's failure to perform in the same eleven respects was justification for his discharge.

5. Plaintiff moved at Special Term to strike those affirmative defenses as insufficient in law, on the ground that none of the eleven enumerated grounds consisted of a breach of any obligation of the employment contract and also because plaintiff was not obliged to prove the performance of any conditions precedent in an action of this kind. On April 12, 1973, Special Term (Alexander Berman, J.) refused to strike the defenses, holding an implied condition precedent of plaintiff's cause of action that he prove that he dealt harmoniously with defendant's employees and customers and that he exercised "proper leadership", and he also upheld the sufficiency of the second and third defenses, pleaded as justification for the discharge. A copy of his memorandum decision is annexed hereto, and such decision was sought to be reviewed in the Appellate Division because, as will appear from the brief, it necessarily affected the judgment.

6. The action came to trial on October 9, 1973 before Hon. John F. Scileppi and a jury and resulted in a verdict for the defendant, upon which the judgment appealed from was entered on October 29, 1973.

7. On April 29, 1974, the Appellate Division of the Supreme Court, Second Department, unanimously affirmed such judgment. Annexed hereto is a copy of its order, and of the Notice of Entry thereof, which were served on me on May 7, 1974.

8. I duly moved in that Court for reargument or for permission to appeal to this Court, which motion was denied by order entered on June 13, 1974, a copy of which order, together with notice of entry were served on me on June 21, 1974. Copies thereof are annexed hereto.

9. No opinions were rendered below except for the memorandum contained in the annexed order of Mr. Justice Berman.

10. I have set forth in the annexed brief the questions of law presented and why such questions merit review by this court, because they are novel and of public importance. The determinations below are in conflict with prior decisions of this court as well as in conflict with a decision of the Appellate Division, First Department.

Dated, New York, July 18, 1974

Sidney S. Bobbe

INTERMEDIATE ORDER DENYING MOTION

PRESENT:

HON. ALEXANDER BERMAN

Justice.

(SAME TITLE)

The following papers numbered 1 to 21 read on this motion to dismiss defenses.

Notice of Motion/Order to Show Cause, papers numbered 1-7.

Answering Affidavits, papers numbered 8-13.

Replying Affidavits, papers numbered 14-15.

Upon the foregoing papers it is ordered that this motion by plaintiff for an order pursuant to CPLR 3211(b) dismissing defendant's five affirmative defenses, and for summary judgment, is granted to the extent that the "Fourth Separate and Partial Defense" is dismissed and is otherwise denied.

The contention that plaintiff may not claim damages in connection with services which were to have been rendered in the future, is without merit. It well may be that the damages to which he will be entitled, if he should succeed in the action, will not equal the total wages which would have been payable during the remainder of the term of his contract. However, that is a question to be determined upon the trial and does not deprive

plaintiff of the right to sue for the full amount, which would be the "prima facie measure" of his damage (Hollwedel v. Duff-Mott Company, Inc., 263 N.Y. 95, 101.)

The Court does not agree with plaintiff's position as to the insufficiency of the other defenses. Insofar as the "First Separate and Complete Defense" is concerned, it may be that certain of plaintiff's alleged failures did not involve "conditions precedent". However, when a party is employed by a corporation as its General Manager and President, it certainly may be inferred that the "conditions" of such employment include dealing with its employees and customers harmoniously and in the best interests of the company and providing proper leadership for the company. In the opinion of the Court, defendant has sufficiently pleaded plaintiff's alleged failure to perform those conditions (CPLR 3015(a)).

The "Second" and "Third" defenses are, likewise, sufficient and defendant should be afforded the opportunity, upon the trial, to prove that its discharge of the plaintiff was justified. Sufficient material and triable issues of fact have been raised with respect to plaintiff's performance of his duties under the contract to preclude the granting of summary judgment (Sillman v. Twentieth Century-Fox Film Corporation, 3 N.Y. 2d 395, 404.)

Insofar as the "Fifth Separate and Partial Defense" is concerned, the question of whether plaintiff has failed to mitigate his alleged damages is one to be determined by the triers of the facts. The fact that it may not be necessary for the defendant to plead such a defense in order to disprove plaintiff's damage claim (concurring opinion, McClelland v. Climax Hosiery Mills 252 N.Y. 347, 354, 355, modified 253 N.Y. 533)

does not render the "Fifth" defense insufficient but merely superfluous.

Enter in Suffolk County.

Dated, 4/12/73

s/A.B.
J.S.C.

NOTICE OF ENTRY

(SAME TITLE)

SIR:

PLEASE TAKE NOTICE that the within is a copy of an Order which was duly made, entered and filed in the office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, Second Department, on the 29th day of April, 1974.

Dated: New York, New York
May 6, 1974

Yours, etc.,

WILLKIE FARR & GALLAGHER
Attorneys for Defendant-Respondent
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 248-1000

TO: SIDNEY S. BOBBE, ESQ.
Attorney for Plaintiff-Appellant
25 West 54th Street
New York, New York

ORDER ON APPEAL FROM JUDGMENT

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on April 29, 1974.

HON. FRANK A. GULOTTA, Presiding Justice

HON. HENRY J. LATHAM
HON. JOHN P. COHALAN, JR.
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER , Associate Justices

(SAME TITLE)

In the above entitled cause, the above named Frank Lowell, plaintiff, having appealed to this court from a judgment of the Supreme Court, Suffolk County, entered October 29, 1973; and the said appeal having been argued by Sidney S. Bobbe, Esq., of counsel for the appellant, and argued by Mark F. Hughes, of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, with costs.

Enter:

Irving N. Selkin
Clerk of the Appellate Division

NOTICE OF ENTRY

(SAME TITLE)

SIR:

PLEASE TAKE NOTICE that the within is a copy of an Order which was duly made, entered and filed in the office of the Clerk of the Appellate Division of the Supreme Court of the State of New York, Second Department, on the 13th day of June, 1974.

Dated: New York, New York
June 21, 1974

Yours, etc.,

WILKIE FARR & GALLAGHER
Attorneys for Defendant-Respondent
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 248-1000

TO: SIDNEY S. BOBBE, ESQ.
Attorney for Plaintiff-Appellant
25 West 54th Street
New York, New York

ORDER ON MOTION TO REARGUE APPEAL OR TO APPEAL TO THE COURT OF APPEALS

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 13, 1974.

HON. FRANK A. GULOTTA, Presiding Justice

HON. HENRY J. LATHAM
HON. JOHN P. COHALAN, JR.
HON A. DAVID BENJAMIN
HON. FRED J. MUNDER, Associate Justices

(SAME TITLE)

In the above entitled cause, the above named appellant having moved for reargument of appeal from a judgment of the Supreme Court, Suffolk County, entered October 29, 1973, or for leave to appzal to the Court of Appeals; from an order of this court dated April 29, 1974, which determined said appeal.

Now, upon the papers filed in support of said motion and the papers filed in opposition thereto; upon the papers on which the appeal was determined; and the motion having been duly submitted and due deliberation having been had thereon, it is:

ORDERED that the motion is hereby denied, with $20 costs.

Enter:

s/Irving N. Selkin
Clerk of the Appellate Division

COURT OF APPEALS
STATE OF NEW YORK

FRANK LOWELL,

Plaintiff-Appellant,

-against-

LEM INSTRUMENT CORP.,

Defendant-Respondent.

PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF APPLICATION FOR PERMISSION TO APPEAL

(Numbers in parentheses refer to pages of transcript set forth in plaintiff-appellant's appendix; when preceded by letter "A", to pleadings, etc., in said appendix; when preceded by letters "RA", to exhibits in defendant-respondent's appendix. All emphasis ours unless otherwise noted.)

Frank Lowell, plaintiff-appellant (hereinafter "plaintiff"), seeks leave to appeal from an order of the Appellate Division, Second Department, dated April 29, 1974, which unanimously affirmed without opinion a judgment of the Supreme Court, Suffolk County (Scileppi, J.) entered October 29, 1973, dismissing the complaint following a jury verdict for defendant-respondent (A-3—A-4). The Appellate Division denied leave to appeal to this Court by order dated June 13th, 1974.

JURISDICTION

The order of the Appellate Division sought to be reviewed is

final since it affirms a final judgment. The judgment thus affirmed was rendered in the Supreme Court in an action which was initiated in that Court.

Hence, the order sought to be reviewed and this application for leave to appeal come within Article VI, §3.b.(6) of the State Constitution and CPLR 5602(a)1.(i).

This application is made within thirty days after service, with notice of entry, of the Appellate Division's order denying leave; thus it comes within CPLR 5513. The application is made in accordance with Rules 500.9 and 500.9(a) of this Court's Rules of Practice.

The action is (1) to recover damages incurred by the wrongful discharge of plaintiff, who was employed by defendant as its general manager and president, and (2) to recover the amount of unpaid salary fully earned by plaintiff before the discharge, in the form of a cost-of-living increment (A6—A-9).

Plaintiff submits that the real reason for his discharge by defendant, which lost money from the inception of his *seven*-year employment contract in July 1968 (Ex. 2, 571-6) to his unwarranted discharge in October 1972, is found in a most revealing inter-office communication, marked "personal and confidential," of Twin Disc, Incorporated, the conglomerate which became the owner in July 1968 of defendant's shares of stock through purchase thereof from plaintiff and his *quondam* associate, one Everett (Ex. 28, 608-9). (Plaintiff's employment contract with defendant was guaranteed by Twin Disc [Ex. 2, 577].) This memorandum, entitled "Lem Divestiture *Strategy*" and dated October 7, *1971*—one year before plaintiff's trumped-

up discharge—is so revelatory of defendant's early designs to get rid of plaintiff, that we take the liberty of quoting from it *in extenso* (609):

> "If the offer were made now, it would either be accepted by Lowell and Everett or refused. If the offer were accepted at an assumed purchase price of $50,000 in this instance, the affect [*sic*] on 1972 Twin Disc earnings would be a $94,000 loss. It is unlikely that Lowell and Everett would accept this type of an offer because its acceptance would bring about the termination of the lucrative employment contracts.
>
> It is more likely that any Twin Disc offer to sell LEM to Lowell and Everett would be refused, in which case we would have to confront the question of the employment contracts. At this point we would have the choice of entering litigation or attempting to settle out of court. If we were to litigate, it was agreed that it would be to Twin Disc's benefit to take the initiative and enter a suit in Federal Court in Milwaukee under Section 10B (5) of the Securities Act as well as try to obtain a Declaratory Judgment. In the former case we would have to prove that Lowell and Everett made misrepresentations about LEM, its customers and its future. To win a Declaratory Judgment we would have to prove that Lowell had not carried out his management duties diligently. If Twin Disc doesn't take the initiative to enter suit, it is almost certain that Lowell will take us to court in an attempt to get the highest possible judgment from us.
>
> To go the litigation route would require from one and one-half years to three years in court at a cost of $10-

$25,000. The affect [sic] on 1972 Twin Disc earnings would be a $67,500 loss, and more important we would lose control over the timing of the major loss associated with the employment contracts.

It is more probable that we would try to settle the employment contracts out of court, in which case the payment would be made immediately or over the four year duration of the contract. Afterwards the assets could be sold or junked. The four-year payoff would cost us $131,000 in 1972 earnings, while the more likely immediate payoff could cost us $205,000 in losses.

Consequently, in summary, if we were to make an offer to Lowell and Everett in the near future, we on the other hand face a prospect of incurring substantial losses which would have to be charged against 1972 earnings, or on the other hand take on the long drawn out court fight, which conceivably could run as long the employment contracts themselves, and at the same time lose control over when we may want to take the losses associated with the contract judgments. It is for these reasons that we recommend against the disposition of LEM at the present time and further recommend that the question be raised again by next July in light of the business forecast for fiscal 1973."

It is, of course, axiomatic that an employee is under no implied obligation to assure financial success of the undertaking.

This application is based on numerous egregious, prejudicial errors made at Special Term and by the trial court in the admission of evidence, and in a confusing—both ambivalent and

equivocal—charge to the jury. As shown immediately below, the rulings so challenged are in conflict with controlling authority which mandate review by this Court and ultimate reversal. A novel question of law of paramount importance to our procedural jurisprudence likewise arises from the lower court's refusal to allow plaintiff's attorney to take exceptions out of the hearing of the jury (557). In denying the request with a curt "No, let's have it, I'm not going to send them back," (557), *nisi prius* flouted the recently enacted CPLR 4110-b, modeled on Rule 51 of the Federal Rules of Civil Procedure, which declares: "Opportunity shall be given to make the objection out of the hearing of the jury."

The Primary Questions Presented and the Reasons for Review.

The important and novel questions of law presented by this application may, preliminarily, be more readily understood with a brief presentation of the pleadings; of an intermediate order entered on April 12, 1973 (Berman, J., A-15—A-17) which necessarily affected the final judgment and which, as the law of the case at *nisi prius* determined the course of the trial and the nature of the trial judge's charge; and of a few salient facts adduced at the trial itself.

On July 3, 1968, plaintiff and his then fellow-shareholder and associate, Robert Everett, sold their stock (all the outstanding shares) in defendant Lem, a manufacturer of electronic brakes, digital servo-devices, and other devices, to Twin Disc for $150,000 worth of Twin Disc's stock (Ex. 1, 566). Lem's production was then geared to the aerospace program. Lem entered into seven-year employment contracts with plaintiff and Everett, guaranteed by Twin Disc (Ex. 2, 571; Ex. K, 634).

Plaintiff's contract provided that he was to be Lem's general manager and president "for the term of seven (7) years beginning as of the date of this agreement, as long as he shall faithfully and diligently perform the duties of his employment and shall engage in no activities which are detrimental to the business interests of Lem and Twin Disc." His compensation was to be $35,000 annually plus cost-of-living adjustments and fringe benefits (Ex. 2, 571-2). Plaintiff was discharged on October 9, 1972. Defendant lost money during the period of plaintiff's employment.

The Pleadings and the Intermediate Order Based Thereon

As noted, in the first cause of action, plaintiff seeks to recover the damages caused by the discharge, and in the second, to recover an unpaid cost-of-living adjustment (A-7—A-9).

In its amended answer, defendant, while admitting execution of the employment contract and the non-payment of the cost-of-living adjustment, denies that it unlawfully discharged plaintiff and alleges as a first defense the non-performance by plaintiff of 11 enumerated specifications, denominated "conditions precedent," as follows (A-12):

> "(1) to achieve the level of performance anticipated for Lem in the "Operation Plans", (2) to achieve any profits for Lem, (3) to meet his sales forecast, (4) to supervise properly the employees of Lem, (5) to retain manufacturers' representatives, (6) to timely pay accounts payable, (7) to report to his superiors, (8) to develop markets and products adequately, (9) to deal with the personnel of Lem harmoniously and in the best

interests of the Company, (10) to deal with the customers of Lem harmoniously and in the best interests of the Company, and (11) to provide proper leadership for Lem."

The same eleven alleged failures are set forth in a second defense as bases for plaintiff's discharge "for cause" (A-12—A-13); and in a third defense, as bases for discharge because plaintiff "had not faithfully and diligently performed the duties of his employment" (A-13).

Plaintiff moved, *inter alia*, to dismiss these three defenses for legal insufficiency (A-18—A-26). The motion was denied by Berman, J., in an opinion reading in pertinent part as follows (A-16):

"The Court does not agree with plaintiff's position as to the insufficiency of the other defenses. Insofar as the 'First Separate and Complete Defense' is concerned, it may be that certain of plaintiff's alleged failures did not involve 'conditions precedent'. However, when a party is employed by a corporation as its General Manager and President, it certainly may be inferred that the 'conditions' of such employment include dealing with its employees and customers harmoniously and in the best interests of the company and providing proper leadership for the company. In the opinion of the Court, defendant has sufficiently pleaded plaintiff's alleged failure to perform those conditions (CPLR 3015(a)).

The 'Second' and 'Third' defenses are, likewise, sufficient and defendant should be afforded the opportunity, upon the trial, to prove that its discharge of the plaintiff was justified."

This determination of Berman, J., *supra*, that some of the eleven specifications of plaintiff's alleged failures constituted conditions precedent, with the concomitant burden on plaintiff to prove performance of these alleged conditions (CPLR 3015-a), necessarily affected the final judgment and, as the law of the case at *nisi prius*, determined the course of the trial in what plaintiff had to prove, and the nature of the trial judge's charge. This basic error, as shown immediately below, permeated the entire trial, is in conflict with controlling authority, and of itself raises a recurring question of law which ought to be reviewed by this Court.

Question 1. Where an employee has been discharged prior to the end of his contract term, does he establish his *prima facie* case by mere proof of the premature discharge, or must he prove in the present circumstances performance of alleged implied conditions of employment deemed below to be precedent to recovery? The courts below held the latter alternative.

Our point of departure is the oft-cited and frequently quoted case of *Linton v. Unexcelled Fireworks Company*, 124 N.Y. 533, decided in 1891 and cited approvingly for plaintiff's contention as recently as *Felsen v. Sol Cafe Mfg. Co.*, 24 N.Y. 2d 682, 685. In *Linton*, plaintiff's contract of employment until December 31, 1889, provided that plaintiff "agrees faithfully and diligently to serve [defendant-employer] as superintendent of their factories, *** and to fill said position to the best of his ability ***; and [plaintiff] covenants and agrees to hold himself at all times subject to the orders and directions of the [defendant's] board of directors, as expressed through the general manager *** And [plaintiff] further covenants and agrees to continue with [defendant] in the full and faithful performance of his duties as superintendent ***. (Record on Appeal, pp. 9-10, found in

Library of the Association of the Bar, Records, Court of Appeals, 1891, 2nd Division, Vol. 12.) The complaint alleged plaintiff's performance until his discharge without cause on February 6, 1889. The answer alleged plaintiff's discharge for cause and plaintiff's non-performance of the contract terms, followed by 12 specifications of misconduct (pp. 5-8; *cf.* these with defendant's 11 specifications herein).

At the trial, plaintiff introduced his employment contract, proof of his discharge, and showed that after effort, he could not obtain other employment, and rested. Defendant introduced evidence tending to support the 12 specifications of misconduct by plaintiff; and in addition offered to show other acts of misconduct not alleged in the answer which the Trial Justice, Hon. Edgar M. Cullen, later Chief Judge of this Court, excluded.

Pertinent indeed is the following from Judge Cullen's charge concerning conditions (p. 114):

> "Therefore, the only question to be determined in this case is, was the defendant justified in discharging the plaintiff before the termination of the contract period. This contract, gentlemen, implies, though it does not state so in words, that this plaintiff would serve the defendant with diligence, fidelity and integrity, and in entire good faith and devotion to its interests. The law imported that into the contract. There was a covenant on his part to observe such diligence, good faith and integrity in his dealings with the defendant, and if, therefore, he failed to keep his contract in these respects, then the employer, the defendant corporation in this case, had the right to terminate the employment

and discharge him, notwithstanding the fact that time for which he was employed had not then expired.

On this branch of the case the burden of proof is on the defendant. It must satisfy you that it had reasonable cause for its discharge of the plaintiff."

In affirming a judgment for plaintiff, this Court, per *Vann J.*, declared (p. 536):

"It was necessary for him [plaintiff] to aver and prove that he was discharged before his term of service, as provided by the contract, had expired, but it was not necessary that he should, specifically or in express terms, aver or prove that he was discharged without cause, as a discharge before the determination of the stipulated period was *prima facie* a violation of the agreement.

The law will not assume that a servant has been derelict in duty from the fact that his employer discharged him, but upon proof under proper allegations that he was discharged while engaged in the performance of the contract and before his term of service had expired, *the burden is cast upon the employer of proving, and hence of alleging, facts in justification of the dismissal.*"

The viable rule of *Linton* that the burden of proof in a breach of employment contract rests upon the employer to establish a defense of justifiable discharge, led the Appellate Division, First Department, to reverse a plaintiff's verdict *only because defendant-employer had been denied the right to open and close.*

(*Herreshoff v. American and British Mfg. Co.*, 164 App. Div. 238).

In the courts below, defendant sought to limit the overriding impact of *Linton* by reference to *Strader v. Collins*, 280 App. Div. 582, as presenting a closer factual pattern. In *Strader*, defendant discharged plaintiff, who had been hired as head coach of a football team, on the alleged ground that plaintiff was physically incapable of performing the contract because of a coronary thrombosis. The trial court charged that it was not necessary for plaintiff to establish his physical ability to perform his contract but that it was defendant's burden to establish plaintiff's physical incapacity. In holding such charge erroneous, the Court, citing *Spalding v. Rosa*, 71 N.Y. 40, observed that in every contract of employment there is an implied condition that the employee will be physically capable of performing duties. This implied condition was one whose performance must be established by the employee.

The rationale of *Strader* can be gleaned from the successful defendant's brief and the authorities referred to therein which were likewise cited in the Appellate Division's opinion. Defendant there urged (Br., p. 27):

> "However, we believe it is clear from the cases that this [Linton] rule applies only where the 'justification' consists of a contention *that the plaintiff did not properly perform his services. It does not apply where the defendant contends, as in the instant case, that he terminated the contract because of the non-occurrence of a condition which does not involve performance of services on the part of the employee.*"

The Court in *Strader* cited *Delano v. Columbia Machine Works and M. Iron Co.*, 179 App. Div. 153, affd. 226 N.Y. 660, and *Burns v. Lipson*, 204 App. Div. 643. In both those cases, unlike the instant case, the employee had agreed to perform "satisfactorily" to the employer, and in each the employer claimed that he had not performed satisfactorily; whereupon the employee claimed that the expression of dissatisfaction was "feigned". This imposed on the employee the obligation to prove, *not the performance of a condition precedent, but a new and independent fact, which was also the case in Strader.*

Thus, in *Burns* the Court said (p. 646):

> "It appears, therefore, that where the contract contains a provision of this kind, the general rule as expressed in *Linton v. Unexcelled Fireworks* (124 N.Y. 533) does not apply and the burden is not cast on the employer of alleging and proving facts justifying a dismissal,***."

The determination by Berman, J., on the motion to dismiss the defenses for legal insufficiency (A-15—A-17), seeking to bridge the gap (*sub silentio*) between *Linton* and *Strader*, perforce left the trial court, bound by the doctrine of the law of the case, in a quandary. Its charge of necessity had to be confusing. The conditions allegediy precedent which, according to Special Term, *plaintiff* had to prove, are the same as those which *defendant* had to prove in justification for the discharge. *Accordingly, both sides had the burden of proving the same thing—an anomaly if there ever was one,* and this necessarily led to the confusion in the court's charge (535-8, 545) which no jury could possibly grasp or reconcile. Illustrative of this confusion and a negation of the *Linton* rule is the following (535-6):

"I say to you that you are to decide here whether this Defendant was justified in dismissing this Plaintiff on October 9th, 1972. *The Defendant has the burden of proof here in establishing that it was justified in dismissing this Plaintiff* as an employee of the Defendant corporation, and he has to prove, the Defendant, must prove that by a fair preponderance of the evidence in this case.

The Plaintiff on the other hand has the burden of proving by the same fair preponderance of the credible evidence that he entered into the contract with this Defendant corporation, and as I said before, there is no dispute as to that. The *Plaintiff must also prove by that fair preponderance of the evidence that he performed all of the terms and conditions of that contract on his part to be performed, and that he was wrongfully discharged, and that he was damaged.*"

With so equivocal and confusing a charge, resulting from the *Linton — Strader* dichotomy, we respectfully submit that a definitive ruling by this Court is called for on so important, recurring and unresolved issue as the true relationship between these two cases and as to the status vis-a-vis the ultimate burden of proof of so-called conditions precedent in employment contracts.

Question 2. Is it reversible error to deny plaintiff's request to take exceptions to the court's charge in the absence of the jury, despite the mandate of CPLR 4110-b, which entitles the parties to that right, and where the charge as given was clearly objectionable in important respects (557)? The courts below gave a negative answer with *nisi prius*' declaring: "No, let's have it. I'm not going to send them back" (557).

CPLR 4110-b, effective September 1, 1973, some time before the trial of this action, was adopted on the recommendation of the Judicial Conference which stated (Nineteenth Annual Report, Leg. Doc. [1974] No. 90, p. 29):

> "The advantages of the new provision are compelling. The new section, based substantially on the experience-proven rule of federal practice (Fed. Rules Civ. Proc. 51) cures a serious lacuna in New York practice by encouraging cooperation of court and counsel where it is needed. The judicial process, essential to the administration of justice, would benefit in several respects."

CPLR 4110-b, like FRCP 51, requires the court, in advance of its charge, to inform counsel—out of the hearing of the jury—of its proposed action on their respective requests, prior to their arguments to the jury; that "no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict***. *Opportunity shall be given to make the objection out of the hearing of the jury.*"

In the instant case not only did the Trial Court not inform counsel of its proposed action on their respective requests, but openly rebuffed plaintiff's counsel for his temerity in requesting the privilege of taking exceptions in the absence of the jury (557; *cf.* the observation of Professor David D. Siegel in his extensive practice commentary on CPLR 4110-b [7B McKinney, 1973-1974 Cum. Ann. Pocket Part, p. 60]: "A denial of a request to charge in the jury's hearing is thought by many trial lawyers to have an adverse psychological effect regardless of the point of law involved").

Because of its newness, CPLR 4110-b has not been the subject of authoritative disposition. However, its model and counterpart FRCP 51 has engendered much appellate discourse (see, *e.g.*, *Swain v. Boeing Airplane Company*, 337 F. 2d 941 [Friendly, J.] *Swift v. Southern Railway Company*, 307 F.2d 315; *Hetzel v. Jewel Companies*, 457 F. 2d 527). The thrust of these decisions is that when the trial court has failed to give the opportunity required by the Rule to counsel to make objections out of the hearing of the jury, the deprived party may fairly be relieved of the portion of the Rule which prohibits assignments of error directed to the charge unless the required objection has been sufficiently made, "and reversal will also be called for if there is reasonable basis for concluding that the colloquy had in the presence of the jury as a result of the judge's ignoring or denying a proper request was prejudicial." (*Swain v. Boeing Airplane Company, supra*, 337 F.2d 941, 945.) In *Hetzel*, the court reversed for errors in the charge to which no exception had been taken.

The two factors set forth in *Swain* are present here. There was prejudice in that plaintiff's counsel was rebuffed before the jury when requesting his statutory right and his major objections were disregarded. Moreover, instructions were given that were not, but could have been, properly excepted to, and as to which plaintiff should have been relieved of his failure to take such exceptions. Illustrative: After charging correctly (535) that "*defendant* has the burden of proof here in establishing that it was justified in dismissing this plaintiff as an employee," the trial court immediately nullifed such principle by charging (536) that *plaintiff* must prove that "he performed *all* of the terms and conditions of that contract on his part to be performed, *and that he was wrongfully discharged.*" Although the determination of Berman, J. (A-16) expressly deemed only three of the eleven

specifications as conditions precedent in the First Defense, the trial court in its charge, *supra*, converted the three into the ubiquitous and undefined "all." The same errors were repeated at page 545.

The Judicial Conference, as noted, has referred to FRCP 51 as the "experience-proven rule of federal practice." It is respectfully submitted that so important and novel question of law in the field of trial practice involving the application and construction of CPLR 4110-b, should be settled by this Court.

Question 3. Is it reversible error to admit in evidence a hearsay letter, written by an employee discharged by plaintiff, charging plaintiff with "continuous and uncalled for abuse" towards such employee, and which vigorously and repeatedly malign's plaintiff's veracity and character? The courts below answered this in the negative.

One of the bitterly contested issues at the trial involved the circumstances of plaintiff's discharge of an employee named Joseph Samuel. Plaintiff testified concerning this (156-60, 211-3, 228-9), and on defendant's case, Samuel testified in defendant's behalf (316-36). After Samuel had finished his testimony and left the courtroom, and while one John H. Batten, president of Twin Disc was on the stand, defendant sought to introduce a letter from Samuel to Batten, dated July 29, 1971, which plaintiff sought to exclude as not binding on him. The objection was overruled (367; Ex. MM, 650-1) and the letter was read to the jury (368).

This letter was highly inflammatory, libelous, conclusory and rank hearsay. It accused plaintiff of "continuous and uncalled for abuse"; of being guilty of "a deliberate and malicious

untruth" in reporting to the Unemployment Insurance Authorities that Samuel had resigned of his own accord; that due to plaintiff's "false statements, Samuel was "being denied rights granted to most Americans, causing my savings to deplete and necessitates selling my shares in Twin Disc Corp. in order to sustain myself and my family temporarily;" and that this was an "unethical, vicious and libelous course of action" by plaintiff. To add to the fire of prejudice against plaintiff, the letter concludes that Samuel's statements "may be substantiated by others who were present" (650-1).

It is axiomatic that the hearsay rule applies to writings, especially where, as here, they contain conclusory matter, and the admission of such evidence is reversible error (see *Blackwood v. Chemical Corn Exchange Bank*, 4 A.D. 2d 656, 658; *Mississippi Shipbuilding Corp. v. Lever Bros. Co.*, 237 N.Y.S. 13; Fisch, Evidence, §757).

In the court below defendant sought to treat the admission of this letter as harmless error. It urged that plaintiff could have cross examined Samuel about it. But Samuel was no longer present when the letter was improperly admitted. Moreover, a hearsay statement, especially one containing libelous matter, is not rendered admissible because the writer can be cross examined about it. Such questioning would only serve to iterate the libel. Finally, a hearsay statement cannot be used to corroborate a witness' testimony. Accordingly, even if Samuel had testified to the same effect while a witness, the letter would still have been inadmissible (*People v. Colascione*, 22 NY 2d 65, 72; 65 N.Y. Jur., Witnesses, §84).

The admission of this highly inflamatory and prejudicial letter itself affords cogent reason for permitting review by this Court.

Question 4. Where an employee is entitled under his employment contract to a cost-of-living adjustment, does he forfeit his right thereto merely because he had voluntarily postponed its receipt? By rejecting plaintiff's motion for a directed verdict on the subject matter of the second cause of action (496-7), the courts below in effect answered this in the affirmative.

The employment contract gave plaintiff a basic annual salary of $35,000 increased in accordance with the Labor Bureau's cost of living adjustments (Ex. 2, 572), and on five occasions subsequently he received from Twin Disc letters as to the computation (101, Ex. 18, 598).

The testimony with respect to this issue was brief. Plaintiff testified that when the first cost-of-living adjustment became due in September 1968, he spoke to Wilton B. Gibson, Twin Disc's vice-president and defendant's chairman of the board of directors, and Gibson then suggested to him that it would make a very favorable impression on Twin Disc's officers if payment of such increases were deferred until defendant was on a more solid footing and showing a profit. Plaintiff agreed on condition that "it was clearly understood by everybody that such deferral didn't represent a waiver or giving up of the increase." Gibson answered that he thought that would be the right thing to do to impress Twin Disc. At the time of his discharge, plaintiff again reminded Gibson of this outstanding obligation, and Gibson indicated he was sure something would be worked out (81-3, 103).

Gibson merely answered in the negative defendant's counsel's question whether he had "urged" plaintiff to defer taking this cost-of-living adjustment (453). It may be noted that plaintiff

had not testified that Gibson had "urged" him to defer, but had merely suggested it (82). In any event, there was a complete absence of proof by defendant that plaintiff had agreed to surrender such adjustment.

It is uncontradicted that the accumulated amount due on this second cause of action at the time of the discharge was $18,220 (116-9).

Defendant's answer (A-10—A-11) is silent as to any plea of waiver, release, surrender or discharge of such obligation. Plaintiff's motion for a directed verdict as regards this obligation was denied on the ground it "is a fact issue" as to waiver (496-7). In its charge the trial court stated:

> "It is for you to say upon all the evidence whether by action or inaction prior to the date of the termination of the contract the plaintiff waived his right to some or all of those fringe benefits (552-3).
>
> "If you find with respect to the $18,220 cost of living adjustments which the plaintiff claims due him, that he didn't waive that, then that's an item of damage which he would be entitled to if you find in favor of this plaintiff.
>
> The mere fact that the plaintiff did not pay himself the cost of living adjustment did not in and of itself constitute a surrender of his rights unless it appears from all the evidence that he intentionally surrendered his right to receive that cost of living benefit during the period up to his discharge *** (554).

As noted, there was not even a scintilla of evidence of any waiver or surrender of the right to this cost-of-living adjustment. Moreover, absent consideration or a writing, the obligation could not be surrendered (General Obligations Law, §5-1103; *Rehill v. Rehill,* 306 N.Y. 126, 131).

That plaintiff was allegedly discharged for "cause" did not deprive him of the right to be paid this cost-of-living adjustment, for no act of disloyalty was involved, as in *Lamdin v. Broadway Surface Adv. Corp.*, 272 N.Y. 133. *Cf. Defler Corp. v. Kleeman,* 19 AD 2d 396, affd. 19 NY 2d 694, where it was held that the employee was entitled to the compensation earned before the act of disloyalty occurred.

In the court below defendant urged that plaintiff had neglected to take advantage of other fringe benefits, such as insurance. This, however, has no bearing on the cost-of-living adjustment. The refusal to grant plaintiff a directed verdict on this issue was patently erroneous.

Additional Questions

In addition to the four primary questions considered *supra*—a determination in favor of plaintiff of any of them would nullify defendant's judgment—this application presents the following questions:

Question 5. Is it legal cause justifying the discharge of the president of a corporation that he has himself discharged a subordinate employee who has refused to obey his orders, is insolent, and questions his authority, threatening him with violence? The courts below have in effect answered this in the affirmative.

Question 6. Was it reversible error to admit in evidence as justification for the discharge proof as to losses sustained in the business over a period of four years, although plaintiff's contract of employment contained no obligation to make a profit or avoid a loss? The courts below answered this in the negative.

Question 7. Was it reversible error to charge the jury that the plaintiff's discharge could be justified "by the totality of the circumstances and whatever happened in the operation of the business," including the losses sustained and including the question as to whether the plaintiff mismanaged the business and whether his mismanagement prevented the projection of sales and profits to be achieved, although no such justification for the discharge was either alleged or proved (538-40)? The courts below answered this in the negative.

Question 8. Where an employer continues to retain the services of the employee for a long period after knowledge of his alleged dereliction, does this not constitute condonation and ratification as a matter of law? The courts below answered this in the negative.

Question 9. Was it reversible error to charge the jury that "even if the employer condoned individual acts," the employee may still be discharged "if the accumulated actions of the employee taken as a whole justify his discharge." and that defendant "was justified in relying on the entire conduct and actions of the plaintiff between 1968 and 1972***if plaintiff's conduct taken as a whole including the acts done in 1972 justified his discharge" (548)? The courts below answered this in the negative.

Each of the questions set forth above presents an important and novel question of law which merits review by this Court. The

determinations below manifest an unjust result to the wronged plaintiff.

The Pertinent Facts

Since the preceding discussion of the legal issues has of necessity required reference to the basic facts, extensive exposition of these and other facts becomes unnecessary for present purposes.

When Twin Disc acquired defendant's stock from plaintiff and Everett on July 3, 1968, defendant's business consisted primarily of the manufacture and sale of miniature electronic clutches and brakes, used mostly in the Apollo space program. Twin Disc's board of directors at that time adopted a resolution stating that "in essence" it was purchasing "two men who have developed a miniaturized clutch, and are now in the initial marketing stages" (Ex. 3, 579). In 1969 it became apparent that the aerospace business had completely collapsed (25, Ex. 24, 601), necessitating defendant's turning to the manufacture of some other product, which it did, in the form of a new and greatly improved electronic shaft encoder. The development of this encoder met with the enthusiastic approval of defendant and Twin Disc in 1970, including the latter's financing thereof for almost $250,000 (Ex. 24, 601; Ex. 26, 605).

Notwithstanding the approval of such financing, defendant at the trial persisted, over objection, in presenting documents and other proof as to the substantial *losses* it had incurred from 1968 until plaintiff's discharge in October 1972 (Exs. C, D, E, F, H, I, J), all as justification for discharging plaintiff.

As noted, as a result of the intermediate order of Berman, J.,

supra (A15—A-16), plaintiff was constrained to prove that he had in fact maintained harmonious relations with customers and employees, certainly during 1972.

Plaintiff testified that he had had no disputes with customers during the term of his employment except with one company that had purchased some encoders and had difficulty in applying and using them. After returning them for repair on two or three occasions, which was done without cost, the customer said that it could not use the encoders in the applications they had anticipated using them, they asked to return them and for a refund of the purchase price about a year after the purchase, whereupon plaintiff informed the customer that the defendant could not accept the encoders for refund (53-55). Apart from that one instance, he had had no difficulty with any other customers, and none such was ever proven by defendant.

As to the "harmonious relations" with employees, plaintiff testified without contradiction that he had had no disputes or controversy with any of the employees of defendant in 1972 until August 11, when an incident occurred between him and Everett (56-59). On that date, when plaintiff learned that Everett had not complied with instructions given him by plaintiff four days earlier, to mail catalogs to sales representatives, plaintiff asked for an explanation, only to be met with loud and insulting remarks, including a statement by Everett that he did not have to do what plaintiff told him to, and that if plaintiff did not like the way he did things, and was not satisfied with the way he did them, plaintiff could do them himself. Everett had customarily attended to the duties of mailing catalogs, etc. (59-60, 291). On this occasion Everett informed plaintiff that he just wasn't going to take orders from plaintiff, whereupon plaintiff told him that if he persisted in his attitude, plaintiff would have to discharge

him; to which Everett responded that plaintiff had no authority to do so, because Everett was vice-president and had a contract, and that if plaintiff discharged him, it would have to be in writing. Plaintiff put it in writing (Ex. 9, 584).

As defendant's witness at the trial, Everett failed to contradict plaintiff's testimony in any material respect, testifying that he "didn't know verbatim what words were used", but admitting the exchange of "unpleasantries", and saying that he had told plaintiff that plaintiff did not have the authority to fire him because he, Everett, "was an officer and had a contract" (264-5, 269-72, 292-6).

That same evening Everett called Gibson, with whom he was very friendly, by long distance and reported what had happened (272-3, 299). Gibson instructed him to report for work the following business day, which Everett did, Gibson promising to come to New York to see what the problem was and whether it could be patched up (273, 299). Everett continued in Lem's employ, without further action by plaintiff, until October 9, when Gibson came to New York and discharged both plaintiff and Everett for unspecified cause. All of defendant's other employees were then discharged, and its business was terminated.

Thus, plaintiff was discharged fifty-nine days after the incident with Everett of August 11. In the interim, no criticism had been directed against plaintiff for having taken the action he did; in fact on August 28, John Batten, Twin Disc's president, wrote him a letter (Ex. L, 637) demanding an explanation, which was given in full in plaintiff's reply of August 31 (Ex. M, 638), following which there was no further communication.

It is plaintiff's claim that he thus conclusively established that, certainly during the nine months prior to his discharge, he had maintained harmonious relations with defendant's employees insofar as was compatible with his authority as president of a corporation to discharge an insubordinate employee, for cause, whether an officer or otherwise, and whether he had an employment contract or not.

Everett was asked by defendant about the circumstances under which plaintiff in June 1971 discharged another employee, Joseph Samuel, an engineer. This inquiry was objected to as irrelevant and too remote, and for the reason that the case was not being tried on the question of whether or not it was proper to dismiss Samuel (250-251), but the objection was overruled. Everett then testified that plaintiff made some belittling remarks to him about Samuel that he could not remember, while he was in plaintiff's office and Samuel was in the outer workroom. Unable to state what was said, he was permitted to say that the "nature of it was that he [Samuel] should be working faster." (254) Everett merely assumed that Samuel heard it. When they went to the area where Samuel was working, to find out what remained to be done, "there was an exchange of words between Lowell and Joe Samuel" (252), and it looked as if something might happen—possibly physical contact between the two men, and Everett had to step between them (297). Samuel was concededly a much bigger man than plaintiff (297-8). Plaintiff then fired Samuel. Everett also testified that Samuel threw a pencil on the floor that hit him on the hand (314), which Samuel admitted he did because he was angry (334-335).

Later, Samuel testified that he heard plaintiff say something, but he too could not remember what, though it made him very angry, and was to the effect that he, Samuel had done some work

out of the order in which plaintiff had asked that it be done (336). Plaintiff testified without contradiction that some work supposed to be done by Samuel had not been completed, and that he suggested to Everett, while they were in his office, asking Samuel why he had decided to do something else first; but that when they approached Samuel, the latter was already on his feet, and, extremely agitated, started to shout at plaintiff, saying he was sick and tired of being told what to do. He called plaintiff names, and came towards him and threw something at him; whereupon plaintiff fired Samuel (506).

A week later, it was decided to ask Samuel to return to work, which he did, but a month to six weeks after that, Samuel announced that he was going to leave, because after being fired he had made other commitments (261-2, 3[illegible]3, 508-9). Samuel testified that during his re-employment relations between him and plaintiff had been amicable again, with no more arguments (331).

Later, Samuel filed a request with the New York State Department of Labor for unemployment compensation, which was denied because he had refused the opportunity to stay (see decision, Ex. 23, 600).

Although the dismissal of Samuel was used by defendant as proof that plaintiff had improperly fired Samuel, Gibson had hand-written the draft of a letter to the Labor Board, stating that Samuel was dismissed "for cause***as a result of his abusive language and threatening action" (Ex. 30, 616).

At no time was plaintiff reprimanded for the action he took in this matter, which had occurred in May of 1971—seventeen months before plaintiff was discharged. Nor could he, as

president of the corporation, be blamed for acting as he did in the face of abusive language and threatened violence, wholly unprovoked.

Two months later Samuel complained to Batten, president of Twin Disc, who was not an officer of defendant, about the denial of his unemployment compensation (not about the initial discharge). This highly infammatory, libelous, conclusory and hearsay communication (Ex. MM, 650-1) was admitted in evidence over objection after Samuel had testified and left the courtroom and while Batten was on the stand. The prejudicial error from such admission is discussed under "Question 3," *supra,* pp. 26-27, and need not be further commented upon.

Defendant also relied on the fact that another employee, one Coruzzi, had been discharged in 1971, after working six months, but at no time was plaintiff criticized for discharging him, and there was no proof whatever that the discharge was unjustified or harmful, or constituted just cause for discharging plaintiff over six months later (156, 263).

In an effort to bolster defendant's sales, Twin Disc had directed one of *its* employees, one Gordon Danhof, to assist in that connection. This was done without even consulting plaintiff, and Danhof was not on defendant's payroll (514). Danhof testified that plaintiff had refused to give certain information to "potential" customers (405-9), and turned down suggestions made by Danhof; but Danhof admitted that he had never sold shaft encoders of any kind, and that he had no technical knowledge of them whatever (425-6). There was, therefore, no reason why plaintiff should accept his suggestions; and as to the refusal to give "certain information" to "potential" customers, plaintiff testified, without dispute, that he declined to let one

such potential customer to go through the shop, or to receive certain secret information that he believed to be proprietary and not to be disclosed, certainly while defendant's patent application was pending (which it was) defendant's patent attorney's having advised against it (516-7). There was thus no issue in the case as to lack of "harmonious relations with customers." Regarding the alleged condition precedent, "to provide proper leadership for Lem," this assuredly was nothing more than a conclusion, not presenting any issue of fact which plaintiff, as defendant's president, had to prove as part of his case, certainly in the absence of any definition in his contract of such an obligation.

Brief reference may be made to some of the previously undiscussed eleven specifications or bases for discharge set forth in defendant's amended answer (A-12). The first is failure "to achieve the level of performance anticipated for Lem in the Operations Plan (A-12). On the trial it was shown that this exhibit (Ex. LL, 646) was no part of the contract, but was delivered *after* the contract was made (352). However, the objection that it was no part of the contractual obligation was overruled for the reason that "it was a question of performance, what was done" (353). An examination of the Operations Plan reveals that it contained no promissory obligation, being concededly only a "plan" and then only *for the first year's operation* (352). How, then, could it be presented as a basis for plaintiff's discharge in October 1972, in view of the fact its "anticipated level of performance" had not been achieved, the reason why being the collapse of the aerospace business, which was fully explained by Gibson, to defendant's satisfaction in his letter to his fellow-directors appointed by Twin Disc, dated May 20, 1970 (Ex. 24, 601)?

The second specification was "the failure to achieve any profit for Lem (A-12). No such obligation is contained in the contract, and none can be fairly inferred therefrom. In the absence of such an express obligation, failure to achieve it is not a legal cause for the discharge. (*Williamson v. American Foil Co.*, 156 App. Div. 329; *Coon v. Floyd-Knox, Inc.*, 296 Mich. 305, 309).

During his cross examination plaintiff was asked what was the operating loss for the first fiscal year. (Such question went even further than the pleaded specification of failure to achieve profits [A-12].) This was objected to as "immaterial and irrelevant under the terms of the contract whether they operated at a profit or at a loss" (136). Although admitting the absence of such provision in the employment contract, *nisi prius* nevertheless overruled the objection on the ground "it has a bearing on the overall issue as to whether or not he [plaintiff] employed his *best interests* in the operation of the business and whether he, himself, complied with *all the terms and conditions of the contract in that respect*" (136); but immediately followed this with the statement, "I don't see anything in the contract that says that this plaintiff was required to make a profit as a condition before receiving salary" (137). In face of the court's ruling, plaintiff testified that in each year of operation, defendant's annual losses ranged from $25,000 upwards (138-9); and defendant was permitted to introduce its financial statements reflecting such losses (139-42; Exs. C-F).

When at the close of defendant's case, plaintiff moved to strike out the defense of plaintiff's failure to achieve any profits, the court denied it, stating (499):

"All of these defenses must be considered in the light of the totality of the evidence here which the defendant at

least claims that with the results, these losses, and these projections *in and of themselves certainly are not a breach, but when taken together****when all these things happened, the projections were not achieved, and the losses did result due to the fact that plaintiff failed to faithfully and diligently perform his duties, and failed to exert his best efforts for the company--that's an issue in the case."

When plaintiff's counsel pointed out that no such claim had been either pleaded or proved (499-500), the court made matters worse by saying:

"*You* have to prove that *you* did it. That's part of your case. They deny it. That's an issue."

Moreover, on July 24, *1972*, after defendant already knew of all the losses sustained up to and including June 30, 1972, Gibson for Twin Disc wrote plaintiff a letter outlining plans for the coming year, in detail, and concluded:

"Good luck, Frank. Maybe this is the year we will get our breaks!" (Ex. 15, 590-2).

In light of such letter, it is inconceivable how it can be claimed that the losses in operation commencing in 1968 could be a basis for a lawful discharge.

The third of defendant's specifications (A-12) was plaintiff's alleged failure "to meet his sales forecast", but no such obligation was contained in the contract, nor was any implied in the annual projections made by plaintiff as to what profit, if any, might be made if a target of expected sales were actually achieved.

Gibson admitted on cross examination that when he wrote Exhibit 15 on July 24, 1972, he knew that the projected sales for that year had not been achieved; nevertheless, he "was deciding upon the fiscal year program for the ensuing year." He was still optimistic about the business (477-8). Even at the time of plaintiff's discharge, he "felt very strongly about the Lem products and its market" (480).

In the court below, defendant for the first time referred to and relied upon the projection of sales and profits, annexed to the contract (Ex. 2) as Schedule "A" (578). However, that schedule was tied into the contract not as a promise to be achieved, but solely as a means of providing for *additional* salary to plaintiff if such projected sales and profits *were* achieved at the end of the third and fifth years of the contract (572, ¶2.b).

The fourth of defendant's specifications was the alleged failure "to supervise properly the employees of Lem" (A-12). No such complaint was ever made against plaintiff, and no proof was ever offered as to this claim, which should surely have been stricken.

The fifth specification was the alleged failure "to retain manufacturer's representatives." The contract contained no such obligation, but plaintiff had nevertheless actually been making every effort to retain such representatives, and Batten, Twin Disc's president, admitted the difficulties that existed in this regard, testifying on direct examination that such representatives came and went, and that when he questioned plaintiff about it, the answer was (364):

> "You have to understand that we are talking about an item that's not easy to sell. It's small, very specialized. It

has a delimited market. I have got to have exactly the right people, or I'm not going to prove a thing."

Batten continued:

"So I deferred to his judgment in an area where I had literally no experience."

It was properly the judgment of plaintiff, as defendant's president, which was controlling, and not that of Batten.

Plaintiff himself explained his difficulties in getting the right people (214, 217), but at the time of his discharge he did have two responsible sales representatives in defendant's employ (593, 596). Where, then, was there a *failure* to retain such representatives, much less a failure attributable to any breach of plaintiff's contract? That defense should have been dismissed, if not at Special Term, then after the proof was in.

The sixth specification—failure to timely pay accounts payable—was dismissed for failure of proof.

The seventh specification was plaintiff's alleged failure "to report to his superiors". No such obligation, express or implied, was in his contract, which employed him as president and general manager. He *had* no superiors, unless the board of directors could be described as such; but admittedly the board was supplied with financial statements every month, and operating reports at each quarterly board meeting; also operating reports, in writing, every month (97), except, so Gibson charged for 1970-1971, but even in 1971 such reports *were* rendered in the months of May and November (Ex. 29, 612, 614). Certainly, they were rendered for all of 1972, including

September of that year (Exs. 16, 17, 593-596). Obviously, such specification, if valid as pleaded, was not proved.

The eighth specification was failure "to develop the markets and products adequately" (A-12). This, too, was no part of the contractual obligation, but, as noted, Gibson, even at the moment of discharging plaintiff and winding up the business, had expressed great confidence as to the products and his unhappiness at the closing down of the business (221). As for the alleged failure to develop the market "adequately", what was "adequate"? Who was to say—a jury, without any guidelines? Was plaintiff obligated to make the business succeed or be discharged, and if so, when?

The ninth, tenth and eleventh specifications are those which Special Term thought were implied conditions precedent. As we have already shown, their worthlessness as grounds for terminating plaintiff's employment is beyond dispute.

In the court below, defendant urged that "the jury decided against appellant and found him *incompetent*" (Br., pp. 22-3). No such issue was pleaded or proved. Incompetency as a ground for discharge must be pleaded (*Fox v. Abe Schrader Corp.*, 36 AD 2d 591, citing *Rosbach v. Sackett and Wilhelms Co.*, 134 App. Div. 130 and *Linton v. Unexcelled Fireworks, supra*, 124 N.Y. 533). Absent such pleading with particularization, defendant's claim must be dismissed.

None of the specifications for discharge was established. Defendant's reliance upon a claim of discharge for incompetence was not only not established but was not even pleaded.

Since in the preceding pages the primary questions of law have been discussed, there appears to be no necessity for repeating them.

CONCLUSION

FOR THE REASONS SET FORTH HEREIN, PRESENT IMPORTANT AND NOVEL QUESTIONS OF LAW WHICH SHOULD BE CONSIDERED BY THIS COURT, THIS APPLICATION FOR PERMISSION TO APPEAL SHOULD BE GRANTED.

Respectfully submitted,

SIDNEY S. BOBBE
Attorney for Plaintiff-Appellant
25 West 54th Street
New York, N.Y. 10019

SAMUEL LAWRENCE BRENNGLASS,
Of Counsel.

Appeal

OFFICE RECORD

87150-3

EXHIBIT J - BRIEF OF DEFENDANT-RESPONDENT IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL

Court of Appeals

STATE OF NEW YORK

(Suffolk County Clerk's Index Number 73-1733)

FRANK LOWELL,
Plaintiff-Appellant,

against

LEM INSTRUMENT CORP.,
Defendant-Respondent.

BRIEF OF DEFENDANT-RESPONDENT IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR PERMISSION TO APPEAL

WILLKIE FARR & GALLAGHER,
Attorneys for Defendant-Respondent,
1 Chase Manhattan Plaza,
New York, N. Y. 10005.
(212) 248-1000

MARK F. HUGHES
ROBERT J. KHEEL
Of Counsel

OFFICE RECORD

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Preliminary Statement

The instant application presents no novel issues or questions of public importance. All that is involved is a contract dispute between an individual and a small company which is no longer doing business Plaintiff-appellant alleges that he was improperly discharged; defendant-respondent claims it properly discharged him.

The action was tried on October 9, 10, 11 and 12, 1973 before Hon. John F. Scileppi and a jury. After 4 days of testimony, during which appellant was the only witness for himself, with 576 pages of testimony and 75 lengthy exhibits marked in evidence, the jury rendered a unanimous verdict for respondent. (App. 562)*

* Citations to plaintiff-appellant's appendix are referred to as "(App.)". Citations to defendant-respondent's appendix are referred to as "(D. App.)".

Despite the unanimous jury verdict and the unanimous affirmance by the Appellate Division, appellant tells this Court that these decisions adverse to him raise issues of "paramount public importance". But this assertion is not surprising. Appellant has repeatedly refused to recognize and accept reality. He would have this Court believe (1) that he is a much maligned and wronged man; (2) that Lem's substantial losses were not his fault; (3) that his fellow employees were "insubordinate", "insolent" and threatened violence; (4) that he was wrongfully fired; (5) that Justice Berman who, prior to trial denied a motion to dismiss the affirmative defenses for insufficiency was wrong; (6) that Judge Scileppi who presided at the trial was wrong; and (7) that the Appellate Division was wrong. Of course, the contrary is true. He is out of step—not everyone else.

At this late date appellant persists in refusing to recognize substantial and convincing evidence of his own failings. He asks this Court to set aside the jury verdict and find, upon his self-serving testimony (which was contradicted in every material respect), that he, *inter alia,* 1) properly supervised Lem's employees and dealt with them in a harmonious manner, although he fired most of them after calling them "schmucks" or "incompetent idiots", 2) provided proper leadership, although the company lost over $256,000 in 4 years, 3) dealt with the customers of Lem harmoniously and in its best interests, although Lem's only salesman testified to the contrary, and 4) reported to his superiors as required, and followed their suggestions, although for over a year no reports of operations were submitted and no sales representatives were retained for years. (App. 142, 266, 320-321, 364-365, 405-409, 423-425, 448)

Summary Of The Evidence At Trial

Significantly the first three quarters of appellant's brief ignore the facts and instead appellant asks this Court to focus on the alleged legal errors below in a vacuum. But a detailed review of the evidence plainly indicates why it took the jury only seventy-eight minutes to reach its verdict.

Appellant sets out at pages 32-44 of his brief what he describes as "The Pertinent Facts". As a review of his record-references reveals, what he recites are not the "facts" but rather his selective, distorted, one-sided view of the evidence adduced at trial, drawn almost exclusively from his own testimony. We are therefore impelled to summarize all evidence adduced at trial.

On December 15, 1967, appellant, as President of respondent Lem Instrument Corp., wrote Twin Disc, a Wisconsin based corporation, informing it that Lem was in need of capital. (Ex. A; D. App. 1) In that letter appellant discussed Lem and his own achievements in what, with hindsight, were highly exaggerated terms.

Thereafter, a representative of Twin Disc came to New York to see appellant. After this meeting a representative of Twin Disc and appellant discussed the question of an acquisition of Lem by Twin Disc. On July 3, 1968, appellant and his fellow-shareholder and partner, Robert Everett, sold their stock (all the outstanding shares of Lem) to Twin Disc for a total of $150,000 in stock of Twin Disc, with appellant receiving $100,000 and Mr. Everett $50,000 worth of such stock. (Ex. 1; App. 344, 567) According to the undisputed evidence at trial, appellant received 3,680 shares of Twin Disc stock which he still owns. (App. 344) Employment agreements were also entered into between appellant and Lem and between Mr. Everett and Lem. (Ex. 2, App. 571; Ex. K, App. 634) Twin Disc guaranteed both contracts.

Appellant's contract provided that he was to be President and General Manager of Lem "as long as he shall faithfully and diligently perform" his duties. His compensation was to be $35,000 per annum plus fringe benefits and cost-of-living adjustments. (Ex. 2; App. 572) In addition, pursuant to the acquisition agreement Twin Disc agreed to advance $250,000 to Lem. Mr. Everett signed an identical agreement, save for compensation and title. (Ex. K; App. 170-173, 634)

Notwithstanding a glowing sales projection of $300,000 (Ex. LL; App. 648), from the outset Lem's performance was dismal and became disastrous. During the first fiscal year ending June 30, 1969 sales were $23,278.50 and Lem lost $56,420.94. (Ex. C; App. 621-622) Appellant himself admitted at trial that Lem's losses were "unsatisfactory". (App. 143) Indeed during his employment appellant referred to Lem's performance as "horrible", "disappointing" and "unsatisfactory." (Exs. G, H, I and J; App. 625, 627, 629, 633)

On April 8, 1969, appellant prepared a more modest projection of $46,800 for the same period covered by the original $300,000 projection. (Ex. N; D. App. 21) As noted above, actual sales were only $23,278.50 for that period.

In June 1969 appellant issued another projection. (Ex. O; D. App. 22) This projected sales of $131,000 through December 31, 1969. Sales for fiscal 1969-70 were only $985.50 and the losses $63,056.79. (App. 142; Ex. D, D. App. 6)

When it became apparent that Lem's performance was not improving, Twin Disc retained at its own expense a full-time salesman (Gordon Danhoff) with twenty years sales experience to assist appellant in his efforts to generate badly needed sales. (App. 349-350) Appellant made scant use of Mr. Danhoff's services, refused to follow his suggestions and stated that he was not helping Lem's sales. (App. 405, 414, 514-516)

Mr. Danhoff testified that appellant refused to give adequate information to certain potential customers developed by Mr. Danhoff. (App. 405-09, 423-25) He further testified that appellant refused to accept constructive suggestions. (App. 405-09, 414, 417, 420) and that appellant had asked him not to submit written reports because too many people "got excited about why he wasn't doing these things". (App. 429-31; Ex. RR, D. App. 52)

On June 3, 1970, appellant made another projection. This time he predicted sales of $200,000 and profits of $52,535. (Ex. P; D. App. 23) Sales for fiscal 1970-71 were in fact only $26,339 and the losses were $75,168. (App. 142)

In November 1971 appellant issued another sales projection through the end of fiscal 1972. (Ex. R; D. App. 28) He projected sales of $132,400. Sales for that fiscal year were $55,370 and losses $60,016. (App. 142) Lem's accumulated losses during the 1968-1972 period were $256,190. (App. 142)

The sales effort and the sales picture were so bad that, during the 4¼ years of Lem operations after Twin Disc acquired it, there were 12 separate months in which no sales were made, 6 separate months in which sales were only a few hundred dollars and no months in which sales exceeded $13,344 (Ex. S; App. 194-195, 642).

Indisputably Mr. Samuel, an employee of Lem, invented the encoder. This was the only Lem product of any real value. (App. 34, 248, 258, 318) Mr. Lowell testified that he assisted Mr. Samuel in the development of that product. (App. 28-31) Mr. Samuel's testimony indicated no such significant role for appellant. (App. 320)

In May 1971, however, appellant fired Mr. Samuel. In his brief (p. 27) appellant asserts that Mr. Samuel's discharge was fully justified because of "abusive language and threatened violence, wholly unprovoked." The evidence at

trial indicated something quite different. According to appellant's final testimony at trial on rebuttal, Mr. Samuel was discharged because he had become belligerent and threw a "saw" at appellant. (App. 506) But during his deposition before trial and during his direct testimony appellant had made no reference to this "saw" although he conceded that the incident was a lively one. (App. 520) Both Messrs. Everett (who witnessed the incident) and Samuel testified that appellant precipitated the incident by continually making deliberately loud and insulting remarks about Mr. Samuel. (App. 252-55; 321-324) Both Messrs. Everett and Samuel denied that Mr. Samuel threw a saw. (App. 313-14, 335)

Mr. Samuel was later requested to come back by Mr. Everett because the work he had been doing remained undone. Mr. Samuel, as a favor to Mr. Everett, returned for several weeks to finish the job upon the understanding that his return was temporary. (App. 259-262, 323-24) Despite Mr. Everett's subsequent efforts to persuade him to remain, Mr. Samuel refused to do so or to take Mr. Lowell's disrespect, even though it meant unemployment for several months. (App. 298-299, 325, 331-332) As Mr. Samuel so poignantly testified at trial: "I told him [Mr. Lowell] I couldn't take any more of the abuse, it was almost every day, and I was just, you know, tired of it and didn't want to take any more . . ." (App. 325) According to both Mr. Samuel and Mr. Everett, Mr. Lowell was in the habit of calling them "schmucks", "incompetent idiots" and other equally derogatory names. (App. 266, 320-21)

In early 1972 appellant fired Mr. Edward Coruzzi, the man he had hired as successor to Mr. Samuel. (App. 262-63) According to appellant, Mr. Coruzzi had erroneously gotten the impression from him that Lem would pay his advanced schooling expenses and give him a bonus after six months. (App. 263)

Appellant in his brief in the Appellate Division, and to this Court (Br. 33) asserts that his testimony to the effect that he had no disputes or controversy with any employees of defendant prior to August 11, 1972 was uncontradicted.

Perhaps this continuing assertion best underscores appellant's continuing refusal to recognize reality. Mr. Everett testified that his relationship with Lowell deteriorated and became strained after the discharge of Mr. Samuel in May, 1971. (App. 265-67, 309) Throughout 1972 appellant and Mr. Everett did not get along. (App. 265-66) According to Mr. Everett, appellant told him that he was fired on several occasions. (App. 264-65) Indeed, Mr. Lowell's "erratic behavior" and "shouting and screaming" at "small incidents that really meant nothing", led Mr. Everett, who was in daily contact with him, to conclude that appellant needed psychiatric help. (App. 301-02) Appellant acknowledged that Mr. Everett had told him that he (appellant) was "crazy". (App. 510)

Finally—on August 11, 1972—appellant handed Mr. Everett a written notice of discharge, and thereupon appellant went on vacation, leaving the two remaining employees, who had no executive or administrative experience, without a supervisor. According to appellant the incident which gave rise to Mr. Everett's discharge went as follows: Mr. Everett "had not complied with instructions given him by plaintiff" relative to mailing certain catalogs and when appellant "asked for an explanation" appellant was "met with loud and insulting remarks" (Br. 33). Mr. Everett testified to the contrary. (App. 269-276) He testified that when he returned from his vacation on August 7, 1972, he found quite a few handwritten requests from Mr. Lowell, one of which requested that certain catalogues be mailed. (App. 270; Ex GG, D. App. 42) Since Mr. Everett's first responsibility was supervision of manufacture and inventory (App. 245, 291) and because customer relations was primarily Mr. Lowell's responsibility (App. 271), Mr. Everett performed those other jobs first.

On August 11, 1972, when appellant was informed by Mr. Everett that special envelopes would have to be purchased for the mailing, appellant suddenly (but characteristically) became abusive and fired Mr. Everett. (App. 272) Whatever the then need for the prompt postage of the catalogues, appellant did not deem it important enough to do it himself, and, after he discharged Mr. Everett, appellant went on his vacation and forgot about the catalogues. (App. 274) Mr. Everett mailed them the following Monday. (App. 274)

As soon as Mr. Gibson, a director of Lem who acted as liaison between Twin Disc and Lem, its wholly owned subsidiary, heard of the discharge (Mr. Everett telephoned him), he rescinded it pending a review by the Board of Directors. (App. 61) Mr. Batten was Chairman of the Board Twin Disc and a director of Lem. Upon his return from a vacation he demanded a written explanation (Ex. L; App. 637), and on August 31, 1972, appellant replied in a letter which accused Mr. Everett of numerous shortcomings. (Ex. M; App. 638)

Appellant claims in his brief (p. 34) that Mr. Everett's testimony about the facts surrounding his discharge "failed to contradict plaintiff's testimony in any material respect." Actually, Mr. Everett repeatedly characterized as lies similar statements which were contained in Mr. Lowell's letter of explanation. (Ex. M; App. 638) Mr. Everett testified that appellant refused to permit him to purchase sensible quantities of inventory (App. 281); Mr. Everett denied leaving early or coming late, and asserted that appellant frequently came to work late and left before 5:00 P.M. (App. 277, 278) Mr. Everett also testified that he had been a buffer between appellant and Mr. Samuel. (App. 279) To corroborate his testimony, Mr. Everett produced several handwritten notes of appellant. (Exs. FF, GG, HH. App. 41-42)

Thus, the record is replete with evidence justifying the jury verdict. It discloses that from July 3, 1968, to October 1972, during which appellant received $157,000 in compensation and $100,000 in Twin Disc stock, Lem lost $256,190 (App. 142), and Twin Disc pumped in more than $482,000 in cash capital. (App. 345) The record further discloses that, when appellant was not firing other employees, he was constantly nagging them and finding fault with them. At the same time he was mishandling the sales and operations end of the business.

Appellant was repeatedly informed of Lem's obvious failings and his shortcomings and was constantly urged to try to improve. (App. 357, 363-64, 473-74; Ex. EE, App. 644) Mr. Gibson* testified that he had on numerous occasions told appellant that "it was a most unsatisfactory operation" which was "not coming up to his [Mr. Lowell's] expectations, or ours". (App. 473-474)

In October 1972 the Board of Directors of Lem was thus faced with repeated and consistent losses, with staff demoralized by appellant's abusive attitude and with a nonexistent sales force. (App. 378-80) The Board had no choice but to close down the operations of the company and to discharge appellant for failure to "faithfully and diligently perform" as required by the terms of his contract. (Ex. 2; App. 571)

Upon appellant's evidence, he was a business genius. Upon respondents' evidence, he was an opinionated blowhard who lacked management skills and botched the job. The jury, aided by the opportunity to observe the attitude and demeanor of the witnesses, had to choose between

* Mr. Gibson for several years tried to help appellant and to encourage him but to no avail. Mr. Batten had misgivings about appellant's performance before Mr. Gibson did. (App. 445)

these two versions of the facts and it accepted respondent's version.*

It is little wonder that the Trial Court denied appellant's motion to set aside the verdict as against the weight of evidence (App. 564) and that appellant's brief to this Court distorts the evidence and strains to find error warranting a review.

In this connection appellant argues 1) that the charge to the jury concerning the burden of proof and instructing it that it could consider the entire dismal history of appellant's leadership of Lem was erroneous and 2) that evidence of his shortcomings was improperly admitted. As the subsequent discussion will reveal, appellant's legal arguments all revolve around an incorrect and absurd understanding of his obligations under his employment agreement (Ex. 2; App. 571) and what constitutes proper cause for the termination of that contract.

POINT I

The Court's Charge to the Jury Was Correct As Were Its Rulings on Admission of Evidence.

In his brief, appellant issues a broadside attack on the charge to the jury. Yet at trial he only took three exceptions to the charge. (App. 558-559) This is hardly evidence of a charge replete with "numerous, egregious prejudicial errors." (Br. 14) It is elementary that a litigant may not urge upon appeal an alleged error in a

*Appellant's abrasive manner manifested itself at trial. Thus appellant interposed his own objection: "I think that is an improper question" and asked the Court for a ruling. (App. 197) His objection was overruled. On another occasion, although the Court had sustained respondent's objection, appellant interjected: "I think that is an important point, Your Honor." The Court replied: "Are you the lawyer or is your lawyer representing you? I have ruled on it." Appellant added "Yes sir" in a belligerent tone, and the Court responded emphatically "Objection sustained." (App. 511)

charge unless he has taken an exception thereto. CPLR §§4017 and 4110-b. *E.g., Miles* v. *R & M Appliance Sales, Inc.* 26 N.Y.2d 451, 311 N.Y.S.2d 491 (1970), *Chapman* v. *Thirty-Ninth St. Realty Corp.*, 26 A.D.2d 806, 274 N.Y.S.2d 172 (1st Dept. 1966).

Appellant complains of isolated portions of the Court's charge and takes those portions out of context. Read as a whole, and this Court's attention is directed especially to App. 531-542, the thirty five pages of instructions are patently correct.

It should be emphasized at the outset that appellant did not object to the portion of the charge relating to the burden of proof. As noted above, he is precluded from doing so now. This alone should be dispositive of appellant's motion.

In effect appellant asks this Court to change the law of contracts and to determine that once he signed the Agreement (Ex. 2; App. 571) he had no responsibilities whatever under it. The Trial Court's charge repudiated this notion and correctly summed up the law and the evidence adduced by both sides at trial, leaving it to the jury to determine the issues of fact raised by conflicting evidence.

A. The Court's Charge to the Jury Correctly Stated the Law.

It is settled law that a plaintiff in a breach of contract action has the burden of proving that he has fulfilled all of the conditions precedent on his part to be performed. As Professor Corbin stated at 5A CORBIN ON CONTRACTS § 1228, at 507-508 (1964):

> "Contract actions almost always involve a claim to pecuniary compensation or other reparation for a breach. It is practically always necessary, therefore, for the plaintiff to allege and prove both the making of a valid contract and its breach; he must show that the defendant came under a contractual duty, that it

> became immediately performable by the fulfillment of all conditions precedent, and that it was not performed."

Accord: 6 *Williston on Contracts* § 830, at 85 (3rd ed. 1962)

Thus, the respondent's discharge of the appellant was wrongful and constituted a breach of the contract only if appellant had performed the conditions precedent on his part to be performed. In *Strader* v. *Collins*, 280 App. Div. 582 at 586, 116 N.Y.S.2d 318 at 322 (1st Dept. 1952), Justice Callahan stated that:

> "Where . . . the contract of employment involves a condition express or implied and the question is whether the condition has been performed, it has been held that on the whole case the burden of establishing performance rests with plaintiff." [Citations omitted.]

RICHARDSON ON EVIDENCE § 110, at 88 (9th ed. 1964), confirms this statement of the law; citing the *Strader* decision, it states:

> "[I]f the contract of employment contains a condition, express or implied . . . the question on trial is whether the condition has been performed."

Appellant suggests in his brief that his agreement contained no express or implied conditions. In short, appellant asserts that he had no responsibility to do anything to justify the receipt of his substantial salary. Such a position is illogical and is certainly not the law. As is stated in Annot., 49 A.L.R. 472, 473 (1927) ("Negligence or incompetency as a ground for discharge of an employee"):

> "The law implies a stipulation or an undertaking, by an employee, in entering into a contract of employment, that he is competent to perform the work undertaken, and is possessed of the requisite skill and knowledge to enable him to do so; and the rule

> is, therefore, if an employee is not qualified to do the work which he is employed to do—is incompetent, unskillful, or inefficient—the employer may legally discharge him at once, as for breach of this implied undertaking, though he has engaged to employ him for a fixed term."

Justice Berman followed these settled principles and specifically determined, upon appellant's preliminary motion to dismiss the affirmative defenses for insufficiency, that:

> "However, when a party is employed by a corporation as its General Manager and President, it certainly may be inferred that the 'conditions' of such employment include dealing with its employees and customers harmoniously and in the best interests of the company and providing proper leadership for the company." (App. 16)

What appellant has done is to confuse proof with pleading requirements. Under CPLR § 3015(a), a plaintiff need only plead performance generally. This places a burden on the defendant, *as a matter of pleading,* to deny specifically in its answer those conditions it claims were not performed by plaintiff. The defendant has done this. (App. A-12-14). But CPLR § 3015(a) does not alter the burden of proof.

As stated in Weinstein, Korn & Miller ¶ 3015.04:

> "CPLR 3015(a), by requiring the defendant to call into question performance or occurrence of conditions precedent, does not alter the burden of proof. As clearly indicated by the third sentence in CPLR 3015(a), the burden remains on the party relying on the performance or occurrence of conditions precedent to establish any that have been specifically denied by the defendant."

Thus while appellant need not have pleaded performance of the conditions precedent, once respondent put specific

failings in issue appellant was obligated to prove performance.

Appellant contends that *Linton* v. *The Unexcelled Fireworks Co.*, 124 N.Y. 533 (1891), supports a contrary position and that he was not obliged to prove performance of any conditions precedent. (Br. 18.) However, his reliance on that case is misplaced. In *Linton*, the defendant had affirmatively pleaded only that it had discharged plaintiff "for cause" and particularized twelve specific breaches of contract, but at trial tried to prove others. The Trial Court refused to permit the admission of such evidence. The Court of Appeals affirmed that exclusion of evidence, observing that:

> "We think that the new matter that the defendants sought to prove in confession and avoidance of the contract and the discharge was properly excluded by the trial court, upon the ground that it had not been alleged in the answer." 124 N.Y. at 538.

Plainly, nothing in that opinion purports to alter the settled law of contracts that, upon proper pleadings, a plaintiff has to prove performance of all conditions precedent on his part to be performed before he can recover for an alleged breach of contract.

It is equally settled law that, notwithstanding an agreement for a definitive term, the employer retains the right to discharge his employee "for cause" during the term of the agreement. As set forth in 36 N.Y. Jur. *Master and Servant* § 27, at 439 (1964) (footnotes omitted):

> "Even though one's services are engaged by another for a definite term, the employer may discharge him for good cause during the term of the employment without incurring liability for breach of contract. * * * The question whether grounds exist for the discharge of an employee is to be determined with a view to the nature of the service, the duties

> imposed upon the employee, and the terms of the contract of employment."

As Annot., 49 A.L.R. 472, 487 (1927) so succinctly states:

> "It it impossible to lay down in any satisfactory way, in general terms, what will justify discharge, as every case must depend to some extent on its own circumstances. But where one is employed as general works manager of an industrial concern, his lack of executive ability, which results in financial loss, will justify his discharge."

Accord: 56 C.J.S. *Master and Servant* § 42(f) at 431 (1948).

At the trial and in deciding the preliminary motion to dismiss the affirmative defenses, the Court below properly determined that the affirmative defenses put in issue whether appellant performed "faithfully and diligently" and whether he had been discharged "for cause". Appellant himself recognized and followed these settled principles when he fired Mr. Everett, who had an identical contract, for "unsatisfactory" performance. (App. 172-173)

Appellant contends that there is something inconsistent with his having to prove performance of conditions precedent and respondent's having to prove discharge "for cause". On the charge to the jury with respect to the burden of proof, appellant significantly took no exception. The plain fact is, and appellant's attorney recognized this at trial, that such instructions were correct and properly reflected the applicable law on this point. Moreover, a defendant is entitled to plead alternative and inconsistent defenses and to have the jury instructed accordingly. Thus even if there were inconsistencies, the Court was justified in charging the jury on the issues of appellant's performance and respondent's discharge of appellant for cause.

But these points are not inconsistent. Certain of appellant's failings might not have constituted a failure to per-

form conditions precedent. But this does not mean that they would not constitute a basis for the jury's decision that "just cause" for discharge existed.

B. The Failure of the Court to Permit Plaintiff's Few Exceptions To Be Taken Out of the Presence of the Jury Is At Most Harmless Error.

Appellant also urges that the Trial Court disregarded amended CPLR § 4110-b which became effective a few weeks before the trial. Appellant did not call this amendment to the Trial Court's attention. In any case appellant's argument on this point is premised on his erroneous assumption that the Trial Court's charge was unfair. But at trial only three exceptions were taken by appellant (App. 558-59) none of which were directed to its instructions concerning burden of proof. Appellant's discussion of the federal cases and the CPLR commentary merely underscores that § 4110-b was adopted to encourage cooperation of the Court and counsel in preparing proper jury charges. (McKinney's CPLR, Commentary § 4110-B). At trial both sides submitted requests to charge. Moreover, the Court's charge adopted practically all of appellant's requests. Under the circumstances the Court's denial of appellant's request to record his exceptions in the absence of the jury was not prejudicial. The charge was complete and fair to both sides.

As the Court held in *Swift* v. *Southern Railway Company*, 307 F.2d 315, 321 (4th Cir. 1962), one of the cases relied on by appellant:

> "If the charge as given is unobjectionable, neglect to affirmatively afford a proper opportunity to object is clearly harmless. * * * It does not require reversal, if the charge as given is substantively

unobjectionable and if there are no other aggravating circumstances indicating actual prejudice."

In an attempt to magnify this incident appellant suggests that appellant's counsel was rebuffed and rebuked by Judge Scileppi (Br. 24). This is plainly not so. Throughout the trial Judge Scileppi was most courteous to counsel on both sides. Indeed he displayed remarkable patience with appellant's overbearing attempts to run the courtroom.

Thus appellant is belatedly seeking to upset the outcome of a four day jury trial by the assertion of a legal point which he suppressed at trial. This hardly rises to the dignity of a novel or important question for this Court's review.

C. The Admission of Evidence Was Correct.

Throughout the trial appellant objected to the admission into evidence of almost any testimony or document which referred to his shortcomings. He objected to the admission of annual financial statements and his own projections (while putting into evidence selected monthly financial statements). (App. 97, 140) He objected to communications by fellow-workers concerning their views of his performance (App. 285, 367, 448); he objected to the admission of correspondence concerning his failure to hire sales representatives (*e.g.*, App. 196, 199); and he objected to the admission of communications which showed his deliberate waiver of benefits. (*e.g.*, App. 206) In short, almost everything unfavorable to him was alleged to be inadmissible. In his desperate attempt to find errors, he singles out from his numerous objections one exhibit and alleges that its admission into evidence was reversible error.

Appellant complains of a letter Mr. Samuel wrote to Twin Disc. (Ex. M; App. 650) The subject matter of the letter was first raised by appellant who put into evidence a report by the Unemployment Department based on appellant's written explanation. (App. 213) But the letter is independently admissible as part of the proof of the circumstances surrounding appellant's discharge. The rule is well stated in Fisch, *Evidence* § 757 (1958):

> "A statement that is not used to prove the truth of the matter it asserts but rather as the basis of an inference for another relevant fact does not come within the hearsay rule. Traditionally this is known as the circumstantial use of words and it falls without the hearsay ban because the statement is not admitted to prove its truth or falsity but because it constitutes circumstantial evidence of another fact."

POINT II

The Court Correctly Ruled That the Issue of Plaintiff-Appellant's Waiver of Fringe Benefits Was for the Jury to Decide.

The second cause of action asserts a claim for certain "fringe benefits." The respondent contended that appellant waived any rights to those benefits by not awarding them to himself while he was President of Lem, in an obvious attempt to reduce Lem's losses and to prolong its tolerance of his shortcomings. According to appellant's testimony, he offered to defer the benefits to make a favorable impression on Twin Disc, but only because he had an oral agreement with Mr. Gibson that appellant would still receive the benefits if Lem's performance improved. (App. 82-83) Mr. Gibson denied this and testified that he had often urged appellant to take advantage of the benefits. (App. 453) Mr. Everett's testimony corroborated Mr. Gibson's testimony

in this respect. (App. 286-89; Ex. FF, D. App. 41) Moreover, certain correspondence to and from appellant was introduced which indicated that he ignored or rejected requests for some of the benefits in dispute. (Ex. AA; D. App. 37) Obviously the jury rejected appellant's testimony and accepted respondent's version of these facts.

Appellant's discussion (Br. 30) about the need for consideration after a debt is due and the case cited in support thereof is beside the point. Appellant by his statements and actions waived whatever right he had to the fringe benefits, and it was in his discretion to do so. As the Court said in *Alsen American Portland Cement Works* v. *Degnon Contracting Co.*, 222 N.Y. 35, 36-37 (1917):

> "Under the evidence, whether or not there was a waiver on the part of plaintiff was a question of fact determinable by the jury. * * * A waiver, not express, found in the acts, conduct or language of a party, is rarely established as a matter of law rather than as a matter of fact. This conclusion inheres in its nature and character. A waiver is an intentional abandonment or relinquishment of a known right or advantage which, but for such waiver, the party would have enjoyed. It is the voluntary act of the party and does not require or depend upon a new contract, new consideration or an estoppel. It cannot be recalled or expunged."

Accord: *Sillman* v. *Twentieth Century-Fox*, 3 N.Y.2d 395, 403 (1957).

At trial, appellant's attorney recognized that the issue of waiver was one of fact. In his requests to charge, he asked the Court to charge that:

> "The mere fact that plaintiff did not pay himself the cost of living adjustment did not constitute a surrender of his right, unless it clearly appears from all the evidence that he intentionally surrendered his right to receive it".

The Court's instructions were to that effect (App. 553) and appellant made no objection. He should not be permitted to raise an objection now.*

Moreover, the law is well settled that a plaintiff is not entitled to any past benefits where the breach of duty is sufficient to justify discharge:

> "If the breach of duty is sufficiently serious to justify discharge, and the employee is discharged, the general view is that there can be no recovery of compensation under the contract if it is indivisible; and even though it is divisible, there can be no recovery on the contract for any portion of a division which owing to the fault of the employee has not been completed." 9 WILLISTON ON CONTRACTS § 1017B, at 173-174 (3rd ed. 1967) (footnotes omitted).

The jury could well have determined here that the various breaches of duty proven at trial were sufficient to deprive him of the fringe benefits even if he had not waived them.

POINT III

Appellant's "Additional Questions" Are also Without Merit.

Appellant poses five so-called "additional questions" (Br. pp. 30-31). None of these questions raises matters of substance or affords a basis for a review by this Court. Appellant's claim of condonation was expressly dealt with in Point III of respondent's brief in the Appellate Division, a copy of which is being filed herewith in accordance with Rule 500.9(a)(3) of this Court.

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* Appellant raised on appeal for the first time a claim that waiver was not specifically pleaded in respondent's amended answer. But from March, 1973, when Twin Disc's answer averring waiver was filed in an almost identical federal action (72 Civ. 1582, E.D.N.Y.) which appellant had also brought, appellant was fully aware of this defense and never objected to its inclusion in this action as well. Indeed, appellant on his direct examination testified upon this very issue (App. 103-05) and took no exception to that part of the Court's charge submitting this issue to the jury.

CONCLUSION

For the foregoing reasons, appellant's application for permission to appeal should be denied in all respects.

Respectfully submitted,

WILLKIE FARR & GALLAGHER
Attorneys for Defendant-Respondent
1 Chase Manhattan Plaza
New York, N.Y. 10005
(212) 248-1000

MARK F. HUGHES
ROBERT J. KHEEL
of Counsel

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

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Index No.

COURT OF APPEALS

FRANK LOWELL

Plaintiff—
Appellant

against

LEM INSTRUMENT CORP.

Defendant—
Respondent

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Bronx, N.Y.

That on August 30 *19* 74 *deponent served the annexed*
Respondent's Brief (3 Copies)

on Sidney S. Bobbe
attorney(s) for plaintiff
in this action at 25 West 54th Streeet, New York, N.Y. 10019
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me
this 30th day of August, 1974

S/
Notary Public

[illegible] J. KENNEDY
[illegible] State of New York
[illegible] Richmond County
[illegible] March 30, 1975

S/
Dominick David Monteverdi, Sr.
The name signed must be printed beneath

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

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80 EXCHANGE PL. AT BROADWAY, N.Y.C. 10004

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF *ss.:*

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on *19* *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

Pls I

EXHIBIT K - STOCK ACQUISITION AGREEMENT 164a

STOCK ACQUISITION AGREEMENT

This Agreement made this 5th day of [illegible], 1963, by and between FRANK LOWELL and ROBERT EVERETT (hereinafter referred to as "SHAREHOLDERS"), and TWIN DISC, INCORPORATED, a Wisconsin corporation of Racine, Wisconsin (hereinafter referred to as "TWIN DISC"),

WHEREAS, SHAREHOLDERS are the owners of all of the outstanding capital stock of LEM INSTRUMENT CORPORATION (hereinafter referred to as "LEM"), a New York corporation, and desire to exchange said shares for shares of the common capital stock of TWIN DISC, and TWIN DISC desires to exchange shares of its common stock for all of the outstanding shares of LEM,

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements herein set forth, it is agreed as follows:

1. Exchange of Shares. SHAREHOLDERS are the owners of record and holders of all of the twelve (12) issued and outstanding shares of common stock, No Par Value (hereinafter sometimes called "LEM Shares") as follows:

FRANK LOWELL	8 Shares
ROBERT EVERETT	4 Shares.

It is the intention of the parties hereto that all of the twelve issued and outstanding shares of common stock, No Par Value of LEM shall be acquired by TWIN DISC and exchanged solely for shares of TWIN DISC's voting common stock, No Par Value (hereinafter sometimes called "TWIN DISC Shares"). TWIN DISC

and SHAREHOLDERS agree that all of the LEM shares shall be exchanged with TWIN DISC for TWIN DISC shares on the following bases.

Upon execution of this agreement, TWIN DISC will deliver to LOEWI & CO., INCORPORATED or a recognized broker, approved by SHAREHOLDERS, making a market in TWIN DISC stock its check in the sum of One Hundred Fifty Thousand ($150,000.00) Dollars together with instructions to said broker to purchase on the market shares of TWIN DISC stock to be placed in the names of the SHAREHOLDERS in proportion to their respective interests herein. Said broker will be instructed that his purchase of TWIN DISC shares under such instructions shall be managed in such a way as to have the least effect upon the quoted market price for such shares, provided, however, that the purchases shall not be spread out for a period of greater than three (3) months following the date of such instructions.

In addition during the seven (7) fiscal years completed following the date of this agreement, TWIN DISC shall deliver to such broker additional sums to be used for the acquisition of additional shares of TWIN DISC stock, the amounts of which shall be determined in accordance with the following provisions:

Promptly after the termination of each fiscal year of LEM, TWIN DISC's accountants (presently Lybrand, Ross Bros. and Montgomery) shall, in accordance with standard and accepted accounting principles and practices, verify the annual statement of LEM determining thereby the pre-tax net earnings of LEM for each fiscal year after the deduction of accumulated operating losses incurred subsequent to April 18, 1968 and not previously

offset against earnings.

Further, it is agreed that if the Directors of LEM determine upon a course of business action for LEM, which it is contemplated will result in a determinable loss or diminution of profits, though in the long-term best interests of LEM, then such loss or diminution of profits is to be disregarded in making such calculations relative to such additional shares.

The amount to be delivered by TWIN DISC to the broker for the purchase of TWIN DISC shares shall be then computed at twenty-five (25%) percent of such pre-tax net earnings. Verification of such accounts, delivery of said funds to the broker and broker's purchase of shares shall be within ninety (90) days after the end of the fiscal period involved. In order to facilitate these computations and in order that LEM's fiscal year may conform with that of TWIN DISC, it is agreed that LEM shall change its accounting periods so that its fiscal year shall end of each June 30, and the first additional payment provided for hereunder shall include the fiscal year ending June 30, 1969 plus any time from the effective date of this agreement to and including June 30, 1968. TWIN DISC has advanced funds to LEM pursuant to a separate loan agreement dated April 18, 1968. For these purposes, therefore, the effective date of this agreement shall be deemed to be April 18, 1968.

It is further agreed that funds delivered to the broker for purchase of shares of TWIN DISC stock, under the terms hereof, for the original purchase and during the seven additional years shall not exceed in aggregate the sum of Five Hundred Thousand

($500,000.00) Dollars. The purchase of such shares by the broker shall be by the broker, as agent for TWIN DISC.

It is further agreed that twenty-five (25%) percent of all shares of TWIN DISC stock acquired during the first two years of this agreement for subsequent transfer to the SHAREHOLDERS under this agreement shall, upon acquisition, be delivered to First Wisconsin Trust Company, Milwaukee, Wisconsin, as agent for SHAREHOLDERS, under an Escrow Agreement substantially in the form set forth as "Exhibit B" attached hereto which shall be entered into by the SHAREHOLDERS as provided for in Paragraph 3(h) of this agreement.

2. Delivery of LEM Shares. On the closing date, SHAREHOLDERS shall deliver certificates for their respective LEM shares duly endorsed in blank, or with duly executed stock powers attached, in proper form for transfer, with signatures guaranteed, and with documentary stamps affixed at SHAREHOLDERS' expense, so as to make TWIN DISC the sole owner thereof, free and clear of all liens, and all trusts, claims, charges, encumbrances, and other restrictions upon the assignment or transfer thereof.

3. Representations and Warranties of SHAREHOLDERS. For the purpose of inducing TWIN DISC to enter into this agreement, the SHAREHOLDERS make the following representations and warranties on their best knowledge, information, and belief.

(a) Status and Authority of LEM

(1) LEM is a corporation duly organized, validly

existing, and in good standing under the laws of the State of New York;

(ii) LEM has no subsidiaries and has no interest, whether by way of stock ownership or otherwise, in any corporation, firm, association, joint venture, or business enterprise.

(iii) LEM is duly authorized and qualified, under, and is in full compliance with, all applicable laws, regulations, ordinances, or orders of public authorities so as lawfully to carry on its business as and where such business is now being conducted;

(iv) Except to the extent that permission or clearance may be required in order to work on United States Government contracts, which permission and clearance stockholders represent has never been denied to them or to its officers in the past, LEM has full right, power and authority to produce, manufacture, sell, and distribute all products produced, manufactured, sold and distributed by it, and otherwise to carry on its business as such business is now being conducted, without any grant of right, permission, license, franchise, or authority from any other person or entity, and without obligation to pay any royalty, fee or other compensation for the privilege of so doing

and they have no knowledge of any claim that any such limitation on said rights exist, other than minor, incidental obligations of the above nature arising in the ordinary course of business;

(v) LEM is not engaged in business in any state, other than New York, any dependency, possession or territory of the United States, or in any foreign country, in such manner that it is required to become qualified or licensed therein;

(vi) The copy of the Articles of Incorporation of LEM, including all amendments thereto, which is attached hereto as "Exhibit C", and the copy of the By-Laws of LEM, including all amendments to date of this agreement, which is attached hereto as "Exhibit D", are complete and accurate copies; LEM shall not amend, change or alter in any manner its Articles of Incorporation or By-Laws prior to the closing date, unless with consent of TWIN DISC.

(b) Capitalization of LEM and right of SHAREHOLDERS to Sell, Exchange and Deliver Their Shares.

(i) LEM has an authorized capital stock consisting of 200 shares of common stock No Par Value; the entire issued and outstanding capital stock of LEM consists of 12 shares;

all such shares so issued and outstanding are validly issued, fully paid and non-assessable;

(ii) SHAREHOLDERS own and hold the entire 12 issued and outstanding LEM shares, in the proportions set forth in Paragraph 1 above, free and clear of all claims, liens, charges, encumbrances, and other restrictions upon the assignment and transfer thereof, and all SHAREHOLDERS have full power and authority, without order of court, to enter into this agreement, and to sell, exchange and deliver to TWIN DISC their respective LEM shares in accordance herewith, free and clear of all trusts, claims, liens, charges, encumbrances and other restrictions;

(iii) There are no options, warrants, calls, commitments or agreements of any type of which LEM or either of the SHAREHOLDERS is a party under which any person has any right to purchase or acquire any capital stock or security convertible into any capital stock of LEM nor are there presently outstanding any other shares of LEM in addition to those held by SHAREHOLDERS.

(iv) LEM shall not, between the date of this agreement and the closing date, make any changes in its authorized capital structure, or purchase any of its issued and outstanding shares.

(c) Financial Condition of LEM.

(i) To the best of SHAREHOLDERS' knowledge and belief, the Balance Sheets of LEM, described below, are in all respects true and complete and accurately present a true and complete statement of the assets and liabilities of LEM as of respective dates of such balance sheets.

(i) October 31, 1967

(ii) LEM has good and marketable title to all of its properties and assets, real and personal, to the closing date including those reflected in the Balance Sheet, dated October 31, 1967, attached hereto as "Exhibit E", and in its books and records of account (except such properties and assets since sold or otherwise disposed of in the ordinary course of business and so reflected in its books and records), subject to no mortgage, pledge, lien, conditional sale agreement, encumbrance or charge, except as shown on such financial statement securing specified liabilities set forth therein, and with respect to which no default exists;

(iii) Except as and to the extent specifically reflected or reserved against in the Balance Sheet dated October 31, 1967, attached hereto, and except for changes resulting from normal

operations since that date, LEM has no liabilities of any nature, whether accrued, absolute, contingent or otherwise (including without limitation, tax liabilities due or to become due, whether incurred in respect of or measured by LEM's income for any period, or arising out of transactions entered into or any state of facts existing, prior to the date hereof); the reserves provided for in said Balance Sheet are adequate to pay all liabilities reflected and set forth therein; and, since the date of said Balance Sheet, to the best of SHAREHOLDERS' knowledge, there has not been any material adverse change in LEM's financial condition, assets, liabilities or business;

(iv) Since October 31, 1967, and to the closing date LEM has not forgiven, compromised or in any manner eliminated from its asset accounts in whole or in part any asset or accrual except as noted in Exhibit F attached hereto.

(v) Except as to such incidental obligations as are referred to in Paragraph 3(a)(iv) above, to the best knowledge, information and belief of SHAREHOLDERS, LEM possesses the unencumbered right to use all the ideas, designs, techniques, and know-how, whether or not patented or patentable, or copyrighted or copyrightable, necessary to carry on its business as it is now being conducted,

and SHAREHOLDERS know of no conflict with the valid patents, trademarks, trade names, and copyrights of others; a list of all patents, patent rights, trademarks, trademark rights, trade names, trade name rights and copyrights possessed by LEM is set forth in Exhibit None attached hereto. The products produced by LEM also shall be deemed to include those set forth in LEM's Catalogue No. 155 which is annexed hereto and marked Exhibit G, and its proposed products shall be deemed to include automatic density control devices.

(vi) LEM since October 31, 1967. has not declared, set aside, or paid any dividend or other distribution with respect to its capital stock; and will not pay any dividend or other distribution with respect to its capital stock prior to or on the closing date except as set forth in Exhibit F.

(vii) The insurance policies set forth in Exhibit H attached hereto are and shall remain through the closing date, in full force and effect.

(viii) To the best of SHAREHOLDERS' knowledge and belief, all of LEM's machinery, equipment and leasehold improvements, if any, are in good condition and repair, and, on the closing date, will be in a state of condition and repair equal to their present state, excepting only ordinary wear and tear and obsolescence, and

LEM is not in violation of any applicable law, ordinance, regulation or zoning requirements in respect thereto;

(ix) LEM's inventories are of a good and merchantable quality which meet the current specifications and standards of LEM's business and are of a kind and quality usable or saleable in the ordinary course of LEM's business;

(x) There are no pending or, to SHAREHOLDERS' knowledge, threatened investigations, or actions at law or in equity, by or before any court, administrative body or governmental commission, bureau, or department, relating to or against LEM, its assets, properties, or business, or relating to or against either SHAREHOLDER, which, if adversely determined, would result in any material adverse change in the assets, properties, or business of LEM or in the right to continue the business heretofore conducted by LEM, or which would adversely affect the ability of SHAREHOLDERS to fully perform this agreement;

(xi) The financial statements of LEM furnished to TWIN DISC hereunder have been prepared from the books of account and records of LEM, which books of account and records have been kept by LEM in accordance with generally

accepted accounting principles and practices, consistently applied.

(d) Tax and Other Returns and Payments

(i) All income tax returns, and all other returns, schedules and reports relating to the payment of taxes, fees, or other charges, federal, state or local required to be filed by LEM have been filed and all taxes, fees, and other charges, as shown thereon to be payable, have been paid;

(ii) No tax deficiencies have been asserted against LEM nor has the Internal Revenue Service, or appropriate governmental agency, at any time claimed that the books and accounts of LEM were not properly kept nor that any changes are required to be made in any of its tax returns previously heretofore filed.

(e) Contracts, Commitments, Etc. of LEM

(i) LEM has no formal or informal pension, retirement, profit-sharing or other employee benefit programs, plans, arrangements, or commitments in existence or contracted for. (TWIN DISC has been furnished a true and correct copy of an agreement among the SHAREHOLDERS and with LEM dated January 7, 1966 which contains terms with respect to employment of SHAREHOLDERS so long as they are owners of stock in LEM.)

(ii) LEM has no formal or informal contracts,

agreements, or understandings (including without limitation written or oral contracts, agreements, or understandings, as well as significant customs, practices or policies relating to or affecting wages, hours or working conditions, or other matters of employee relations which are not discoverable from any written contract, agreement or understandings) with labor unions; there are no strikes, nor is there any pending controversy between LEM and any labor union which in SHAREHOLDERS' opinion may lead to a strike, or similar concerted activity, and SHAREHOLDERS know of no jurisdictional dispute between any labor unions affecting LEM or the personnel thereof;

(iii) There are no outstanding purchase or sale contracts or commitments of any kind, oral or written, which affect the assets, property, or business of LEM, except such as have been made in the normal course and to meet the normal requirements of the business for the purchase of raw materials and supplies and services required in the operation of the business, none of which are burdensome or materially adverse and except such as have been

made in the normal course of business for the sale of LEM's products at and upon LEM's regularly established prices and terms, except as set forth in Exhibit I attached hereto;

(iv) There are no agreements, contracts, or commitments outstanding, oral or written, under which any person or entity has the right to sell or to direct the sale of, any of LEM's products, or to receive a fee or commission thereon, or to have first call on the said products, or any part thereof, or upon the productive capacity of LEM, except as set forth in Exhibit J attached hereto;

(v) Since November 2, 1967, LEM has not paid or agreed to pay, and prior to the closing hereunder will not pay or agree to pay, any management fee or special management compensation or commission to any person or entity; LEM is not a party to any contract, oral or written, under which any person or entity (other than LEM's officers) has the right to manage or direct the management of its business or receive any fee therefor;

(vi) Since November 2, 1967, LEM has not increased the regular compensation payable or to become payable by it to any of its officers, employes, or agents, and has not since that date made any special compensation or bonus arrangement

to or with any person; and since said date LEM has not made any agreement with any agent or employe for a long term contract except as set forth in Exhibit K hereto.

(vii) LEM is not in default under any agreement with any party with whom it has contractual relations;

(viii) LEM is not a guarantor, surety or endorser with respect to any debt or obligation or with respect to any contingent debt or obligation, and is not an insurer with respect to any liability of any person or entity, except as set forth in Exhibit None attached hereto;

(ix) Other than ordinary and recurring trade accounts payable and the above referred to Stockholders' Agreement, LEM has no presently existing contracts, leases or commitments extending beyond June 30, 1969 or involving payments by LEM aggregating more than Fifteen Thousand Dollars ($15,000.00), except for the lease to its present premises, and except for insurance policies and excepting obligations incurred with the approval of TWIN DISC.

(f) General

(i) SHAREHOLDERS know of no unusual factor or major change in the business of LEM or in the industry in which it operates or in its competitive position that would threaten the business

of LEM or the potential successful operation thereof.

(ii) From the date of this agreement to the closing date, LEM will conduct its business in the ordinary and normal manner, and will maintain its established practices and policies in the conduct of its affairs, and will not without the prior written consent of TWIN DISC make any loans, or make any unusual contracts, agreements, commitments, purchases or sales, or pay any bonuses to SHAREHOLDERS, directors, or officers, or make any adjustments in wages, salaries, or other payments (except to pay to the extent otherwise authorized, loans from or advances by SHAREHOLDERS) to or compensation of SHAREHOLDERS, directors, officers, employes, former employes, or others, or make any changes in list prices, or depart from the ordinary and normal course of business;

(iii) All warranties and representations of SHAREHOLDERS contained in this agreement shall survive the closing of this agreement;

(iv) SHARLHOLDERS shall hold all common shares of TWIN DISC received by them pursuant to this agreement for investment and each SHAREHOLDER does hereby represent and agree that he is not acquiring such common shares with a present view to

the distribution thereof;

(v) Without making any commitment in contravention of this agreement, the SHAREHOLDERS and TWIN DISC will continue to use their and its best efforts to keep LEM's business organization intact, to keep available the services of its present officers and employes and to preserve for LEM the good will of its suppliers, customers, and others having business relations with LEM.

(g) SHAREHOLDERS warrant and represent that all transactions between October 31, 1967 and closing date have been and shall be entered on LEM's books, and such transactions were and shall be in the ordinary course of LEM's business, made in good faith, in accordance with good business practice, and are and shall be entered on said books in accordance with generally accepted accounting principles, consistently applied, except as set forth in Exhibit F. It is the intent of TWIN DISC to authorize Lybrand, Ross Bros. & Montgomery, CPA's, to audit the books of LEM as of June 30, 1968 and for the year then ended.

(h) Escrow Agreement

To better secure the representations and warranties contained in this Paragraph 3 of this agreement, SHAREHOLDERS shall at the time of closing execute the Escrow Agreement as provided in Paragraph 1 of this agreement.

4. Representations and Warranties of TWIN DISC. For the purpose of inducing SHAREHOLDERS to enter into this agreement, TWIN DISC makes the following representations and warranties:

(a) Status of TWIN DISC. TWIN DISC is a corporation duly organized, validly existing, and in good standing under the laws of the State of Wisconsin;

(b) Lawfulness of TWIN DISC Shares. As of the closing date, and as of each subsequent date at which TWIN DISC shares are to be acquired under the provisions of Paragraph 1. hereof, the TWIN DISC shares delivered to SHAREHOLDERS will constitute the valid and legally issued shares of TWIN DISC, fully paid and non-assessable (except for liability for debts owing to employes for not in excess of six (6) months' services performed, as provided by Section 180.40(6) of the Wisconsin Business Corporation Law), and will be legally equivalent in all respects to all other of the issued and outstanding common stock of TWIN DISC;

(c) Survival of Warranties. All warranties and representations of TWIN DISC contained in this agreement shall survive the closing of this agreement.

5. Closing of this Agreement. The closing of this Agreement shall be in the manner and subject to the conditions as follows:

(a) Conditions of TWIN DISC's Obligations. All obligations of TWIN DISC under this agreement are subject to

the fulfillment prior to or on the closing date of each of the following conditions:

(i) All of SHAREHOLDERS' representations and warranties contained in this agreement shall be true on the closing date as though such representations and warranties were made on the closing date;

(ii) SHAREHOLDERS shall have performed all of the terms, covenants and conditions of this agreement on their part to be performed prior to or on the closing date.

(b) Conditions of SHAREHOLDERS' Obligations. All obligations of SHAREHOLDERS under this agreement are subject to the fulfillment prior to or on the closing date of each of the following conditions.

(i) All of TWIN DISC's representations and warranties contained in this agreement shall be true on the closing date as though such representations and warranties were made on the closing date;

(ii) TWIN DISC shall have performed all of the terms, covenants and conditions of this agreement on its part to be performed prior to or on the closing date;

(c) Inspection and TWIN DISC Representatives to Closing Date. SHAREHOLDERS shall, forthwith upon the date of this agreement, have caused LDM to make available to TWIN DISC and its duly designated representatives, including but not limited to its designated accountants

and attorneys, for inspection at any time during regular business hours, its premises, and all assets, documents, books, and records relating to LEM and its business. SHAREHOLDERS shall, forthwith upon the date hereof, have obtained the authorization of LEM for TWIN DISC, its agents and representatives, to make such lists, synopses and copies of any and all books, records and documents relating to the business affairs of LEM (other than drawings, designs, test data, patent applications and similar items) as TWIN DISC may desire. TWIN DISC shall, from the date of this agreement and until the closing date, have the right to place and maintain its duly authorized representatives and agents on the premises of LEM, and such representatives and agents of TWIN DISC shall have the right to take such action as may be reasonably necessary for the protection of TWIN DISC'S interest under this agreement.

(d) Closing Date. The closing date shall be July 3, 1968 at 2:00 P.M. at the offices of TWIN DISC, INCORPORATED, Racine, Wisconsin.

(e) Documents to be Delivered by SHAREHOLDERS. At the closing of this agreement the SHAREHOLDERS

shall deliver, or shall cause to be delivered, to TWIN DISC (in addition to certificates representing all the issued and outstanding LEM shares, escrow agreement and proxy) the following:

(i) A written opinion of counsel to the effect that as of the closing date the matters represented and warranted by SHAREHOLDERS in form and substance hereto annexed are true and accurate.

(ii) General releases of all claims whatsoever, except in respect of accrued or current salary, or note payable, and except in respect of funds loaned LEM or advanced for its account by the SHARLHOLDERS as reflected in the Balance Sheet dated October 31, 1967, or accrued or advanced since said date.

(iii) Certificate of each and all of the SHAREHOLDERS that each and all of the representations and warranties contained in this agreement are true as of the closing date. In the event an uninsured casualty loss is sustained by LEM subsequent to April 18, 1968 and prior to the closing date which exceeds the sum of $25,000.00 in value, or in the event of the death of Lowell or Everett, TWIN DISC shall have the option

to determine whether to close under this agreement in accordance with the terms thereof, or at TWIN DISC's further option, TWIN DISC shall have the right to terminate this agreement and not to close hereunder, without any liability or responsibility as between any of the parties to this agreement.

(iv) All corporate record books, stock record books and corporate seal.

(f) Documents to be Delivered by TWIN DISC. At the closing of this agreement TWIN DISC shall deliver to SHAREHOLDERS the following:

(i) Evidence satisfactory to SHAREHOLDERS of the deposit of $150,000.00 by TWIN DISC with Loewi & Co. Incorporated for the purchase of shares of stock of TWIN DISC as provided hereinabove;

(ii) A written opinion of counsel, dated as of the closing date, to the effect that the execution of this agreement is a duly authorized and proper corporate transaction;

(iii) Proper corporate resolutions, duly certified by the Secretary of TWIN DISC, authorizing the acts as to which counsel have given their opinion, pursuant to the next preceding subparagraph.

6. Joint and Several Liability, Etc. All warranties, representations, agreements and undertakings made by the SHAREHOLDERS under or pursuant to this agreement shall be deemed to have been made jointly and severally by all and each of the SHAREHOLDERS. If any of the several SHAREHOLDERS shall fail or refuse to deliver to TWIN DISC as of the closing date any of the LEM shares to be exchanged by him hereunder, such failure or refusal shall not relieve the other SHAREHOLDERS of any obligation under this agreement, and TWIN DISC, at its option and without prejudice to its rights against such defaulting SHAREHOLDER, may either acquire the LEM shares it is otherwise entitled to acquire hereunder, or refuse so to do and thereby terminate all its obligation hereunder.

7. Notices. Any notice, request or other communication hereunder to be given by the SHAREHOLDERS to TWIN DISC shall be sent by Certified mail, postage prepaid, Return Receipt Requested, to TWIN DISC, addressed as follows:

Secretary
TWIN DISC, INCORPORATED
1328 Racine Street
Racine, Wisconsin 53403

Any notice hereunder to be given by TWIN DISC to the SHAREHOLDERS, or any of them, and any correspondence by TWIN DISC with LEM, shall be sent by Certified Mail, Return Receipt Requested, with postage prepaid, addressed as follows:

Frank Lowell
25 Alpine Way
Huntington Station, New York

Robert Everett
1798 Horatio Avenue
Merrick, New York

Notice shall be deemed to have been given as of the first full business day after the date shown on the postmark of the envelope enclosing any notice.

8. Co-Operation of SHAREHOLDERS After Closing. If any claim of any nature shall be asserted or any action shall be commenced against SHAREHOLDERS or LEM by a third party, or by any SHAREHOLDER against a third party, which shall affect the rights or obligations of TWIN DISC or of LEM in any manner whatsoever, then the SHAREHOLDER shall promptly and in no event more than ten (10) days after he receives notice of or institutes any such claim or action notify TWIN DISC, giving particulars of the claim or action and copies of all correspondence, pleadings, or other materials in connection therewith. The SHAREHOLDERS shall cooperate and consult reasonably with TWIN DISC in connection therewith.

9. SHAREHOLDERS represent that they are obtaining the shares of TWIN DISC stock to be obtained hereunder for investment and not for the purposes of distribution and that they do not, for the period of at least two (2) years after the date of receipt of any of said shares, intend to sell or offer for sale, any part thereof. In the event SHAREHOLDERS or either of them desire to sell all or any of such shares within such period of two (2) years, TWIN DISC shall have the right and obligation to buy such part, or all,

of such shares as SHAREHOLDERS may then propose to sell, at a price which shall be the mean between the bid and asked prices on the over-the-counter or other quoted market on the date SHAREHOLDERS notify TWIN DISC of the desire for such sale. Any pledge of such shares by SHAREHOLDERS shall be subject to this agreement for repurchase by TWIN DISC. TWIN DISC shall have five (5) business days after receipt of such notification to pay the purchase price therefor and to receive duly endorsed certificates for the transferred shares. The certificates for said shares shall be caused to be endorsed with a legend to the effect that said shares are subject to restrictions on transfer pursuant to agreement between the SHAREHOLDERS and the Company and that a copy of the agreement containing said restrictions is on file with the Secretary of the Company. The endorsement shall be eliminated two (2) years after the stock is originally transferred to SHAREHOLDERS. SHAREHOLDERS shall additionally execut[illegible] and deliver to TWIN DISC a letter of investment intent in form and content satisfactory to the respective counsel of TWIN DISC and of SHAREHOLDERS.

10. It is agreed that if at any time during the period ending June 30, 1975, TWIN DISC desires to dissolve LEM, or to sell all or any of its assets other than in the ordinary course of business or to transfer ownership of any part of its interest in LEM, the SHAREHOLDERS shall be given notice thereof and shall thereupon have the option exercisable at any time within six (6) months following such notice to acquire from TWIN DISC all of the then outstanding shares of

LEM at a price and upon terms not less favorable than the terms of such contemplated transaction.

11. TWIN DISC agrees that the principal business location of LEM shall remain in New York City or Long Island and shall not be removed therefrom without the consent of SHAREHOLDERS who then remain a Director or employe of LEM.

12. In the event of a material breach of the representati and warranties made hereunder by SHAREHOLDERS resulting in damages to TWIN DISC, which cannot be compensated for pursuant to the Escrow Agreement herein provided for, TWIN DISC shall notify SHAREHOLDERS of such breach and of the damages sustained thereby. SHAREHOLDERS shall have the right to pay to TWIN DISC (including application of the shares then held in escrow) the amount of such damages within sixty (60) days; upon failure of which, TWIN DISC may, at its option, declare this contract and any others related to it at an end together with any continuing rights or obligations of the parties except as hereinafter specified. In such event SHAREHOLDERS shall be entitled to retain any TWIN DISC stock received by them hereunder and not applied pursuant to the foregoing provisions, and TWIN DISC may retain its shares of LEM stock, and provided further that in such event, LOVELL and EVERETT shall be accorded one-year consultancy agreements with LEM at one-half the compensation paid during the last year before such termination, without bonus, and be restricted from engaging in activities in competition with LEM, or TWIN DISC, for such one-year period. Damages, as used herei means actual monetary damage, and does not include litigation expen

13. Multiple Counterparts. This agreement may be executed simultaneously in duplicate originals, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the SHAREHOLDERS have signed this instrument, individually, and TWIN DISC has caused this instrument to be signed by its duly authorized officers, and its corporate seal to be hereunto affixed, all of the day and year first above written.

IN PRESENCE OF:

_____ FRANK LOWELL

_____ ROBERT EVERETT

TWIN DISC, INCORPORATED

By _____
President

ATTEST:

By _____
Secretary

EXHIBIT L - EMPLOYMENT CONTRACT

EMPLOYMENT CONTRACT

Agreement made this 3rd day of July, 1968 by and between LEM INSTRUMENT CORPORATION (hereinafter called "LEM"), a New York corporation, and FRANK LOWELL (hereinafter called "Lowell") of Farmingdale, New York,

WHEREAS, all of the capital stock of LEM is being acquired by TWIN DISC, INCORPORATED (hereinafter called "TWIN DISC") a Wisconsin corporation, pursuant to a Stock Acquisition Agreement between TWIN DISC, Lowell, and Robert Everett, and, which will result in LEM operating as the wholly owned subsidiary of TWIN DISC, and

WHEREAS, Lowell has served as President of LEM, and LEM desires that his services continue to be available to LEM,

NOW, THEREFORE, in consideration of the mutual covenants, conditions and agreements herein, it is agreed as follows:

1. Lowell is herewith employed by LEM as General Manager and President of the Company for the term of seven (7) years beginning as of the date of this agreement, as long as he shall faithfully and diligently perform the duties of his employment and shall engage in no activities which are detrimental to the business interests of LEM or TWIN DISC. LOWELL agrees to devote his full time and his best efforts in the furtherance and interests of LEM. It is also anticipated that Lowell will be elected as Director of the Corporation without additional compensation. Full time as used herein shall mean that time customarily devoted as President, Director and General Manager, by other such executives with comparable education, training and experience who are employed by comparable firms.

2. LEM agrees to compensate Lowell for his services hereunder on the following bases:

a. An annual salary of $35,000.00 payable in equal semi-monthly installments commencing April 18, 1968 with cost of living adjustments in the same manner as said cost of living adjustments are accorded to employes by TWIN DISC. Said salary includes a beginning base salary of $26,120.00 per annum plus the applicable cost of living adjustment.

b. Annexed hereto as Schedule A is a forecast of sales and profits of LEM for the seven (7) year term of this contract. If the after-tax performance of LEM shall exceed the forecasted figures at the end of the third and fifth years of this agreement, the basic salary for each ensuing year otherwise provided under paragraph a. above, shall be proportionately increased, provided, however, that no such increase shall result in the basic salary exceeding that of the average base salary (currently $36,640.00) for the five top TWIN DISC Vice-Presidents (not including any Executive Vice-President).

c. Annual bonuses determined by the Board of Directors of LEM out of after-tax profits in excess of twelve percent (12%) of LEM capital plus accumulated earnings without reduction for accumulated losses shall also be paid, provided that such bonus shall not exceed twenty percent (20%) of the salary for the applicable period.

3. Lowell acknowledges that as between Lowell and LEM, LEM is the owner of and has the unencumbered right to use the ideas, designs, techniques and know-how presently used by it and developed by Lowell for use in the production, sale, use or distribution of its products. Any invention, improvements or development made or originated by Lowell at any time during the life of this agreement, and in any way relating to the matters aforesaid or to the manufacture or use of the company's products, shall be and remain the property of LEM and, if deemed appropriate to its protection by LEM, Lowell shall execute such documents of assignment thereof as LEM may request without any provision for royalty or other payment of any kind. Further, Lowell will, at LEM's request, cooperate with it in filing and obtaining any patents, copyrights, or similar protection that may be available for such developments.

4. In consideration of this employment contract, and the payment to him of the compensation provided for his service, Lowell agrees that during the life of this agreement and for the period of one (1) year after its termination (except for default or breach by LEM), he will not, directly nor indirectly, or as employe, consultant, agent, representative or otherwise nor as owner, partner, joint venturer or shareholder of more than five percent (5%) of the stock of any company, engage in any activity in competition with LEM, TWIN DISC, or the successors to the business of either. For these purposes an enterprise shall not be deemed in competition with TWIN DISC or LEM if it is engaged in the business of manufacturing or

selling components for use only in total machines or equipment manufactured, built or assembled by such enterprise, (rather than in the manufacture of such components primarily for sale to others) in the following fields:

Precision Clutches and Brakes;

Automatic Tensioning Systems;

Analog to Digital Shaft Encoders;

Precision Speed Reducers;

Digital Sensors;

Remote Digital Control Systems; and

Automatic Density Control Devices.

On termination of this agreement, Lowell shall be offered a one-year consultancy agreement at compensation equal to one-half the compensation, without bonus, for the final year, following which the restrictions on competition shall terminate.

5. Lowell agrees that the knowledge he presently has, or may obtain in the course of his employment, with respect to the conduct and details of the business, processes, formulae, machinery, and arts, which are secret, used in the manufacturing of its products will not be imparted to anyone whomsoever other than the officers or employes of LEM or the representatives of TWIN DISC, or the customers of either in the normal conduct.

of their business, and that if he violates the terms of this provision or of Paragraph 4. above, LEM, or its successor, shall be entitled to an injunction obtained in any court of competent jurisdiction restraining him and each and every other person concerned therein from the continuance of such breach.

6. In addition to the compensation hereinabove provided, it is agreed that there shall be made available to Lowell fringe benefits on the basis comparable to those afforded employes of TWIN DISC charged with similar duties and receiving similar compensation. If feasible, said benefits may be provided directly by TWIN DISC under such plans for benefits made available to its employes, but with the cost thereof charged to LEM in such event. The areas of such benefits are:

a. Management Group Consulting and Widows Benefits Arrangements

b. Keyman Group Insurance (Life) with premiums chargeable to you as salary

c. Group Accident, Health and Travel Insurance

d. Retirement Plan

e. A company automobile with appropriate insurance therefor

f. Option to acquire Twin Disc stock on the same bases as the same may be offered Twin Disc's top five Vice-Presidents (other than Executive Vice-President).

7. In the event of the requirement of any notice

provided for under this instrument, the same shall be deemed effectively given by certified mail, return receipt requested, in the case of TWIN DISC, addressed as follows:

Twin Disc, Incorporated
1328 Racine Street
Racine, Wisconsin 53403

Attention: Robert T. Howell;

in the case of notice to Lowell to:

Frank Lowell
25 Alpine Way
Huntington Station, New York.

8. This agreement shall be binding upon the heirs, representatives, successors or assigns of the parties hereto. The agreement shall be construed in accordance with the laws of the State of New York, and in the event it shall be determined that any provision above is violative of any law and unenforceable, the remaining portions shall nonetheless be of full force and effect, unless inconsistent with the agreement with such clauses removed.

IN WITNESS WHEREOF, these presents have been executed by the parties hereto as of the day and year first above written.

LEM INSTRUMENT CORPORATION

By /s/ Robert A. Everett
Its ~~Vice President~~

Attest:

By /s/ Robert A. Everett
Its Secretary

/s/ Frank Lowell
FRANK LOWELL

For valuable consideration, TWIN DISC, INCORPORATED herewith guarantees performance of the terms of this agreement to be performed by LEM, and to vote its share of LEM Stock to elect Lowell to LEM's Board of Directors during the life of this agreement. In the event LEM is either liquidated or disposed of, either through sale of assets or through sale of controlling interest in its stock, TWIN DISC will make available to Lowell employment in New York City or Long Island on a comparable schedule of compensation (other than the additives provided under Paragraph 2.c. of the foregoing agreement), provided, however, that no part of this guarantee shall be effective in the event LEM or its assets are disposed of to Lowell and/or Everett, or to their nominees.

DATED at Racine, Wisconsin, this 3rd day of July, 1968.

TWIN DISC, INCORPORATED

By /s/ Wilton B. Gibson

Its Vice-President

(Corporate Seal) Attest:

By /s/ R. T. Howell

Its Secretary

Schedule "A"

198a

LEM Instrument Corporation

Letter of Intent

21 March 1968

FORECASTED SALES AND PROFITS

Year	Projected Sales	Proj. Profit Rate Before Tax	BEFORE ~~After~~ Tax Annual Net Profit
1	$ 300,000.00	17.0	$ 51,000.00
2	600,000.00	16.5	99,000.00
3	1,000,000.00	16.0	160,000.00
4	1,400,000.00	15.5	217,000.00
5	1,800,000.00	15.0	270,000.00
6	2,200,000.00	14.5	319,000.00
7	2,600,000.00	14.0	364,000.00

EXHIBIT M - LETTER DATED OCTOBER 9, 1972 199a

587

PLAINTIFF'S EXHIBIT 12 - Letter dated October 9, 1972 (Introduced p. 80)

LEM INSTRUMENT CORPORATION
20 SARAH DRIVE • FARMINGDALE, NEW YORK 11735 • TEL: 516 293-7240

PLAINTIFF'S EXHIBIT 10 EV 9-26-72

October 9, 1972

To: Mr. Frank Lowell
Mr. Robert Everett

Subject: Offer to Terminate the Operation of LEM Instrument Corporation by Twin Disc, Incorporated, the sole shareholder.

PLAINTIFF'S EXHIBIT # 12-EV 10-10-73

This will confirm the offer to sell the assets of LEM Instrument Corporation to the original principals, Mr. Frank Lowell and Mr. Robert Everett made by Twin Disc, Incorporated in the office of Mr. Frank Lowell on Wednesday 27 September 1972.

The offer is to sell the assets only to the two principals, change the company name and transfer the name "LEM" to the two principals in exchange for that number of shares of "Twin Disc" equal to the sale price, to be based upon the mid-point value between the "asked" and "bid" quotes in the Wall Street Journal on the day of agreement.

The asset value is established from the LEM Balance Sheet as at 31 August 1972 as follows:

Accounts Receivable - Trade	$3693.91	
" " - Deposit	875.00	
		$ 4568.91
Inventory -		53376.22
Prepaid Insurance -		120.00
Machinery & Equipment (net) -		9243.59
Patent -		1.00
Deferred Research & Development -		88297.92
		$155607.64

Further, in consideration for an immediate release from employment contracts held by the two principals, and guaranteed by Twin Disc, and all other terms contained in the original purchase agreement, Twin Disc will allow the equivalent of one year of salary for each of the two principals ($35,000.00 and $20,000.00 respectively) reducing the sale price to a net of $100,000.00.

Sincerely,

William P. Lebow

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION TO SERVE AMENDED AND SUPPLEMENTAL COMPLAINT (Filed November 7, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

FRANK LOWELL, :

Plaintiff, :

-against- : 72 Civ. 1582 (J.M.)

TWIN DISC, INCORPORATED, :

Defendant. :

----------x

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION TO SERVE AMENDED AND SUPPLEMENTAL COMPLAINT

This Memorandum is submitted in support of defendant Twin Disc, Incorporated's motion ("Twin Disc"), pursuant to Fed. R. Civ. P. 56, for partial summary judgment dismissing the three causes of action set forth in the Complaint and in opposition to plaintiff's motion, pursuant to Fed. R. Civ. P. 15, for leave to serve an amended and supplemental complaint.

The background of this case is set forth in defendant's moving affidavit ("Kheel Affidavit"). Briefly, in 1968 defendant acquired all of the stock of Lem Instrument Corporation ("Lem")

from plaintiff and one Robert Everett. At that time, plaintiff and defendant executed an acquisition agreement (the "Acquisition Agreement"). Plaintiff also entered into a written employment agreement (the "Employment Agreement") with Lem, which agreement was guaranteed by defendant.

Between July 1968 and October 1972, Lem lost over $250,000 and Twin Disc poured in $482,000 in an effort to develop Lem as a viable company. Because of plaintiff's shortcomings, as set forth in the Kheel Affidavit (¶¶10-12), these efforts proved futile. Accordingly, on October 9, 1972, plaintiff was discharged from his position at Lem and defendant closed Lem's operations down.

Thereafter, plaintiff challenged the propriety of these events by bringing two actions. On or about October 19, 1972, the present action was brought in New York State Supreme Court, from which it was removed to this Court by defendant, a Wisconsin corporation. In January 1973, plaintiff commenced an action against Lem in the Supreme Court of the State of New York, County of Suffolk (the "State court action"). In both actions, damages were sought by plaintiff for an alleged breach of the Employment Agreement. In addition, in the present litigation plaintiff sought recovery from Twin Disc for breach of the Acquisition Agreement in that Twin Disc was alleged, immediately after its discharge of plaintiff, to have sold or disposed of all of Lem's assets and

to have terminated Lem's business in violation of plaintiff's rights under the said agreement.

The State court action -- Frank Lowell v. Lem Instrument Corp., 73/1733 -- went to trial on October 9 through October 12, 1973, resulting in a unanimous jury verdict in favor of the defendant. This constituted a finding by the jury that plaintiff had breached the Employment Agreement and that he had been justifiably discharged from his position at Lem. The Judgment entered upon the verdict in defendant's favor was unanimously affirmed upon appeal to the Appellate Division, Second Department; subsequent motions by plaintiff for leave to appeal in the Appellate Division and in the Court of Appeals were unanimously denied.

Accordingly, defendant now seeks summary judgment in the present action. Plaintiff has conceded the validity of such a motion as to the first and second causes of action of the Complaint. See Lowell Affidavit ¶3; Plaintiff's Memorandum, page 2. Nevertheless, plaintiff attempts to resist dismissal of this action by requesting leave to file an amended and supplemental complaint (the "proposed amended complaint"). However, the proposed amended complaint does not rectify the shortcomings of plaintiff's original pleading. The first, second and fourth causes of action of the proposed amended complaint ultimately rest upon plaintiff's claim of wrongful

discharge, which claim was rejected in the State court action. Similarly, substantial evidence received in the State court action refutes plaintiff's contentions in the third cause of action of the Complaint and in the third, fifth and sixth causes of action of the proposed amended complaint that Lem's business was terminated prematurely and that plaintiff was deprived of rights under the Acquisition Agreement. That evidence showed that Twin Disc contributed to Lem substantial sums of money in order to help Lem become a viable enterprise. But Lem nevertheless consistently lost money, making inconceivable any possibility of an earn-out based on net profits. In addition, the evidence showed that plaintiff had never exercised an option to reacquire Lem extended to him by defendant in a letter dated October 9, 1972.

The proposed amended complaint does not alter plaintiff's original pleading in any material respect. To grant leave to file the proposed amended complaint would be a futile gesture. Moreover, plaintiff is guilty of laches since he waited until now, after the State court action has been tried and appealed, to seek amendment. Under these circumstances, the Court should (1) grant summary judgment in defendant's favor dismissing the three causes of action set forth in the Complaint and (2) deny plaintiff's motion for leave to serve an amended and supplemental complaint.

ARGUMENT

Point I

SUMMARY JUDGMENT SHOULD BE GRANTED DISMISSING THE THREE CAUSES OF ACTION SET FORTH IN THE COMPLAINT

Plaintiff has conceded that the Judgment in the State court action renders the first two causes of action of the Complaint in the case at bar subject to dismissal on the ground of res judicata. See Lowell Affidavit ¶3; Plaintiff's Memorandum, page 2. In any event, there can be no doubt that these two causes of action involve the identical issues resolved in defendant's favor in the State court action. It follows that plaintiff is barred from the maintenance of these two causes of action. See Zeldman v. Celebrezze, 252 F. Supp. 167, 171 (E.D.N.Y. 1965) (Mishler, J.).

The plea by Twin Disc of a former Judgment is patently proper in the present case. Even though Twin Disc was not technically a party to the State court action, it is entitled to the benefits of the Judgment therein. See B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141 (1967); Israel v. Wood Dolson Co., 1 N.Y.2d 116 (1956). Indeed, even aside from the well-settled authority relating to res judicata and collateral estoppel, Twin Disc, as guarantor of Lem's debt, has been discharged under the law of suretyship as a result of the Judgment in

favor of Lem in the State court action.

> "...[I]f the surety's obligation is merely to answer for a debt or default of the principal, a judgment in favor of the principal in an action brought by the creditor establishes that the principal is not liable on the obligation, or that as between them there has been no debt or default, provided the principal's successful defense was on the merits of the creditor's claim." 57 N.Y. Jur. Suretyship and Guaranty §242, at 604 (1967) (footnote omitted).

Accord, People v. Metropolitan Surety Co., 171 A.D. 15, 156 N.Y.S. 1027 (3d Dep't 1916).

In the third cause of action of the Complaint, plaintiff claims that he was wrongfully discharged as an officer and employee of Lem, that he was deprived of his contractual right to acquire Lem upon termination of its operations and that such termination was in breach of the Acquisition Agreement in that it destroyed plaintiff's opportunity to receive additional stock pursuant to said agreement's provisions relating to Lem's future profits. But, contrary to the implication in paragraph 22 of the Complaint, plaintiff did receive an option to acquire Lem, which option he wholly failed to exercise, and, in light of the appalling history of Lem's business subsequent to its acquisition by defendant, it is absurd speculation

to assert that Lem's profits could, in the less than three years remaining under the Acquisition Agreement, have reached a level entitling plaintiff to the receipt of additional shares of stock in accordance with that agreement. And certainly it could not be established by competent proof that the profits would have reached that level. (See Kheel Affidavit ¶¶17-18.)

The Judgment in the State court action conclusively established that the discharge of plaintiff and the termination of Lem's business were justified. The Employment Agreement and the Acquisition Agreement were executed as part of a single transaction. Obviously, there would have been no employment contract if there had not been an acquisition and, equally obviously, there would have been no acquisition without an employment contract. Plaintiff cannot now maintain that he is entitled to recover damages for violation of rights which ceased to exist with his lawful discharge and the closing of Lem's business. See Vernitron Corp. v. Benjamin, 440 F. 2d 105 (2d Cir.), cert. denied, 402 U.S. 987 (1971); Israel v. Wood Dolson Co., 1 N.Y. 2d 116 (1956); Byrd v. Meadow Gold Products Corp., 60 Misc. 2d 212, 302 N.Y.S. 2d 701 (S. Ct. Kings Co. 1969).

Thus, no genuine issue of material fact exists in the case at bar precluding the grant of partial summary judgment in favor of defendant dismissing each of the causes of action set forth in the Complaint.

Point II

BECAUSE THE PROPOSED AMENDED COMPLAINT WOULD ITSELF BE SUBJECT TO DISMISSAL AND BECAUSE PLAINTIFF HAS BEEN GUILTY OF LACHES IN WAITING UNTIL NOW TO SEEK AMENDMENT, THE COURT SHOULD DENY PLAINTIFF'S MOTION FOR LEAVE TO AMEND.

Despite the liberality with which leave to amend is usually granted, allowing amendment upon the facts in the present case would be both inappropriate and inequitable. Amendment would be a futile gesture and should not, in any case, be permitted because of plaintiff's laches in delaying until this late date his motion for leave to file an amended and supplemental complaint.

A. Futility of Amendment

At the outset, it is apparent that the proposed amended complaint does not alter plaintiff's original pleading in any material respect. The claims asserted in the proposed amended complaint would be barred by the principles of res judicata and collateral estoppel, and amendment would be a fruitless act.

An essential element of the first, second and fourth causes of action asserted in the proposed amended complaint is the alleged impropriety of plaintiff's discharge -- an issue already fully adjudicated on the merits in the State court action. The obligation to keep plaintiff on Lem's Board of Directors, referred to in the first cause of action of the

proposed amended complaint, and the guarantee of alternate employment, referred to in the fourth cause of action of the proposed amended complaint, both were set forth in the Employment Agreement and were limited to the life of the Employment Agreement. But the Judgment in the State court action conclusively establishes that plaintiff breached the Employment Agreement and that defendant was legally justified in discharging him. The Employment Agreement had come to an end and Twin Disc had no further obligation thereunder. Even more striking is plaintiff's attempt to circumvent the result of the State court action by claiming that he is entitled to damages as a result of his discharge pursuant to a fraudulent scheme by defendant. This claim, alleged in the second cause of action of the proposed amended complaint, is predicated on a document specifically introduced in evidence in the State court action, and plaintiff recites here the same litany of unfounded allegations that he urged in that action. (See Kheel Affidavit ¶¶12-16.)

The jury verdict in the State court action destroys the foundation of any charge of a fraudulent scheme by defendant or any of its employees, or of an obligation on defendant's part to keep plaintiff on Lem's Board or to provide him alternate employment upon the termination of Lem's business. Since these issues were litigated in the State court action, the Judgment there bars plaintiff's assertion

of the first, second and fourth causes of action of the proposed amended complaint:

> "A judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first...." Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 N.Y. 304, 306-307 (1929).

Accord, Buchanan v. General Motors Corp., 158 F.2d 728, 730 (2d Cir. 1947) ("[T]he usual rule as to the effect of a former judgment . . . is that the judgment is res judicata not only as to all the issues decided but also as to all that could have been"); Siegel v. National Periodical Publications, Inc., 364 F. Supp. 1032, 1035 (S.D.N.Y. 1973) ("[T]he issues which plaintiffs want to litigate in this action could have been raised in the ... [state court] action, and consequently are barred by res judicata ...").

The third and fifth causes of action of the proposed amended complaint allege claims identical to those asserted in the third cause of action of plaintiff's original pleading. The sixth cause of action in the proposed amended complaint, which is founded upon the claim that Twin Disc did not exert its best efforts to keep Lem in business, is no more than another way of restating the claim--raised in the third cause of action of the original pleading and the third cause of

action of the proposed amended complaint--that Twin Disc terminated Lem's business without justification and prematurely and that plaintiff was damaged thereby through loss of his opportunity to receive additional stock pursuant to the Acquisition Agreement. Thus, the aforesaid causes of action of the proposed amended complaint are transparently the same in substance as claims asserted in the third cause of action of the original pleading, a cause of action that--as previously urged in Point I, supra,--should be dismissed by the Court.

Under these circumstances, leave to amend should not be granted. The Court of Appeals for the Fifth Circuit has succinctly stated the relevant rule in DeLoach v. Woodley, 405 F. 2d 496 (5th Cir. 1969):

> "...The liberal amendment rules of F.R. Civ. P. 15(a) do not require that courts indulge in futile gestures. Where a complaint, as amended, would be subject to dismissal, leave to amend need not be granted." 405 F.2d at 496-497.

Accord, Billy Baxter, Inc. v. Coca Cola Company, 431 F.2d 183, 189 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971); Thermal Dynamics Corp. v. Union Carbide Corp., 42 F.R.D. 607, 609 (D.N.H. 1967) (amendment denied where facts forming factual basis for amendment had been raised in previous case); Kaplan v. United States, 42 F.R.D. 5, 7 (C.D. Cal. 1967) (motion to amend after two years denied where moving party did not present a

prima facia meritorious claim).

Since all of the causes of action alleged in the proposed amended complaint would be barred under the principles of res judicata and collateral estoppel, amendment would serve no purpose and should not be permitted.

B. Plaintiff's Laches

Furthermore, leave to amend should be denied here because plaintiff has been guilty of laches in waiting until now to seek amendment. Laches is a proper reason for denial of leave to amend, particularly when amendment is sought several years after the complaint was filed. See Wheeler v. West India S.S. Co., 205 F.2d 354 (2d Cir. 1953). All facts alleged in the proposed amended complaint were known by plaintiff prior to trial in the State court action. (See Kheel Affidavit ¶ 19.) Indeed, he used discovery in this action as a vehicle to get evidence for that action after he waived any rights to discovery therein. He could have sought amendment in this action many months earlier.

Plaintiff's only excuse for this failure to seek such amendment is that he "believed it was inappropriate and untimely to amend the existing complaint until the result of the State court action became final." (Lowell Affidavit ¶ 3.)

To the extent that this statement implies that he was unaware prior to trial in the State court action of the facts upon which his motion here is predicated, plaintiff misleads the Court. He chose not to amend in 1973 because he thought he would win in the State court action. He was wrong. Now, having fully and unsuccessfully litigated in the State court action, he wants another bite out of the apple. Plaintiff tries to put forward various theories for recovery that he hopes are superficially different enough from his previous claims to persuade this Court to permit him another chance. But, plaintiff's theories still turn on the propriety of his discharge, and on that issue he has already litigated and lost in the State court action. Plaintiff ought not be permitted to continue his harrassment of defendant by amendment of the Complaint and by further extensive litigation.

CONCLUSION

For all of the reasons set forth hereinbefore, the Court should grant the motion of defendant for summary judgment dismissing the three causes of action set forth in the Complaint and should deny the motion of plaintiff for leave to serve an amended and supplemental complaint.

Respectfully submitted,

WILLKIE FARR & GALLAGHER
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

MARK F. HUGHES
ROBERT J. KHEEL
RICHARD L. FELLER,
Of Counsel

DEFENDANT'S STATEMENT UNDER RULE 9 (g) (Filed November 7, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK LOWELL,	:	
Plaintiff,	:	72 Civ. 1582 (J.M.)
-against-	:	
TWIN DISC, INCORPORATED,	:	
Defendant.	:	

STATEMENT UNDER RULE 9(g)

Defendant, for its Statement under Rule 9(g), alleges as follows:

(1) Frank Lowell, the plaintiff herein, was the plaintiff in an action in the Supreme Court of the State of New York, Suffolk County, entitled Frank Lowell v. Lem Instrument Corp., Index No. 73/1733 (the "State court action").

(2) Said State court action proceeded to trial on October 9, 10, 11 and 12, 1973, and, upon a jury verdict in favor of the defendant, a Judgment was entered, dismissing the action. Upon appeal to the Appellate Division, Second Department, that Judgment was affirmed, and plaintiff's motions in the Appellate Division and in the Court of Appeals for leave to appeal to the Court of Appeals were denied.

(3) The Judgment in the State court action is final and binding on the plaintiff therein.

(4) The causes of action asserted in the State court action are the same causes of action as are asserted in the first and second causes of action of the Complaint herein.

(5) Plaintiff entered into an employment contract with Lem Instrument Corporation ("Lem"), which contract was guaranteed by Twin Disc, Incorporated ("Twin Disc").

(6) Plaintiff, defendant and Robert Everett executed a stock acquisition agreement on July 3, 1968, whereby defendant acquired all the stock of Lem from plaintiff and Everett.

(7) The employment contract and the stock acquisition agreement were executed as part of a single transaction, and neither document would have been executed in the absence of the other.

(8) Between July 3, 1968, and October 9, 1972, Lem incurred substantial losses aggregating over $256,000.

(9) Between July 3, 1968, and October 9, 1972, the amount of monthly sales by Lem never exceeded $13,344.

(10) Between July 3, 1968, and October 9, 1972, there were twelve separate months when no sales were made by Lem.

(11) Between July 3, 1968, and October 9, 1972, defendant gave Lem $482,000 in capital.

(12) At its own expense, defendant hired a salesman, Gordon Danhoff, to help Lem.

(13) Plaintiff breached his employment contract with Lem and was legally and justifiably discharged.

(14) On October 9, 1972, defendant justifiably terminated Lem's business operations.

(15) By letter dated October 9, 1972, defendant offered to sell the assets of Lem to plaintiff.

(16) Plaintiff did not accept that offer.

WILLKIE FARR & GALLAGHER
Attorneys for Defendant

By _____
(A Member of the Firm)

1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

PLAINTIFF'S REPLY MEMORANDUM
(Filed December 2, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

FRANK LOWELL, :

Plaintiff, :

-against- : 72 Civ. 1582 (JM)

TWIN DISC, INCORPORATED, :

Defendant. :

- X

PLAINTIFF'S REPLY MEMORANDUM

The First and Second Causes of action in the original complaint sought recovery against Twin Disc on its agreement guaranteeing performance of the Lem employment contract. Plaintiff concedes that by reason of the dismissal of his complaint in the state court as against Lem, the guaranty of performance falls with it. This concession is evidenced by the fact that the proposed amended complaint has eliminated those two causes of action. If, therefore, this Court grants leave to serve the proposed amended complaint, the question is set at rest. And even if the Court should refuse to allow service of the amended complaint, then plaintiff has stated in his reply affidavit that he will not oppose the dismissal of those two causes of action.

Yet subsequent to the plaintiff's motion to serve the

amended complaint, defendant has moved for summary judgment dismissing those causes of action, although the question is moot. In any event, the decision on the motion for leave to amend should be granted priority.

Defendant has also moved for summary judgment dismissing the Third cause of action, which motion plaintiff vigorously opposes. That question will also become moot if leave is granted to serve the proposed amended complaint, because the contents of the present Third cause of action are reasserted in the proposed amended complaint, partly in the new Third cause of action and partly in the new Fifth cause of action. But if such leave is not granted, then plaintiff urges the denial of the motion as to that cause of action. The basis of defendant's motion is the claim that the dismissal of plaintiff's state court action against Lem on the employment agreement is res judicata so as to bar the maintenance of the action based on an entirely different contract between plaintiff and this present defendant, i.e., the stock acquisition agreement. Defendant claims that merely because both contracts were made at the same time, the dismissal of the one must lead to the dismissal of the other, even though they are not by their terms made dependent on one another and even though the adjudication in the state court was between different parties than this action, with wholly different and unrelated issues involved. Not only was the present claim against Twin Disc not presented in the state court, but it could not have been

presented there, and was at all times presented here. The motion for summary judgment to dismiss the Third cause of action should therefore be denied.

POINT I

DEFENDANT HAS FAILED TO SHOW ANY VALID REASON FOR DENYING THE MOTION FOR LEAVE TO SERVE THE PROPOSED AMENDED AND SUPPLEMENTAL COMPLAINT, EVEN THOUGH DEFENDANT ADMITS THAT LEAVE TO AMEND A PLEADING MUST BE LIBERALLY GRANTED.

Defendant's main argument on this question seems to be its claim that plaintiff has been guilty of laches. But the motion was made within a month after plaintiff learned that the New York Court of Appeals had denied leave for him to appeal to that court from the dismissal of his state court claim against Lem. Until that happened he still had the possibility of pursuing defendant in this Court on its guaranty of performance by Lem, in the event of final success in the state courts. Moreover, as plaintiff's affidavits show, some of the evidence upon which he now relies was only recently discovered and all of it revealed only after the original complaint here had been filed.

Moreover, if plaintiff had been ultimately successful in the state court, there is little doubt that it would have promptly led to a disposition of the other issues presented here, by settlement or otherwise. It would therefore have been an improvident act to make the motion sooner than it was made;

and in any event defendant has shown no undue prejudice resulting from the delay.

Defendant's citations do not support its contention. Thus, Thermal Dynamics (42 F.R.D. 923) was a case where there were two causes of action sought to be alleged in a proposed amended complaint. The court refused to allow the first cause, because it was barred by res judicata, but allowed the second, even though there had been a delay of 21 months since filing the original complaint.

In Kaplan v. United States (42 F.R.D. 5, 7) the Government had delayed two years before seeking the amendment which would have added a counterclaim. The Court said that in its discretion it could have refused to grant leave on that ground, but the Court said:

> "However, the factor upon which the Court relies most heavily in denying the motion is the fact that the affidavits filed by the Government do not present even a prima facie case that the counterclaim is meritorious. The Court recognizes the fact that * * * the Court cannot and should not rule on the merits of the proposed pleading. However, when the pleading and affidavits filed in support of leave to file it are totally lacking in merit, then leave to amend should be denied. The least that should be expected of the moving party is that he present a prima facie meritorious claim."

Surely, it cannot be said in the case at bar that at least a prima facie case has not been presented. Yet the defendant argues the question as if this Court should decide the merits of the claim on the affidavit of its attorney, Mr. Kheel.

The Wheeler case, which defendant cites at p. 12, is certainly not in point. There the motion to amend was made after the case had already been tried and decided, which was three years after the filing of the original complaint.

Defendant also argues that the plaintiff's motion should be denied because plaintiff could not succeed in proving his claim and therefore it would be futile to permit the amendment. But in so arguing defendant goes into the merits, to the extent of considering, for instance, the mere improbability of plaintiff's being able to prove that if Lem's business had been allowed to continue, plaintiff would have become entitled to receive additional stock of Twin Disc, a question delving into the merits, and weighing the probability of success, and yet plaintiff has shown in his reply affidavit that he could well establish the fact on the trial, and which indisputably presents at least a strong prima facie case.

The defendant also cites (p. 11) two other cases which have no application here. Thus, the De Loach case (405 F.2d 496) was one where the complaint was dismissed for failure to allege the required jurisdictional amount, and the Court denied a subsequent application to amend because it still failed to show the jurisdictional amount and would therefore have been dismissable on motion if leave to amend had been granted.

And the case of Billy Baxter, Inc. (431 F.2d 183) was also one where the Court held that the proposed amendment did not cure the absence of factual support that existed with

respect to the original complaint, and leave to amend was therefore denied.

To deny the motion to amend on the grounds asserted by defendant would amount to a denial of the principle set forth in Rule 15, that leave to amend "shall be freely given when justice so requires, which Rule the Supreme Court has said means that it shall be "liberally granted" (Foman v. Davis, 371 U.S. 178).

POINT II

THE FIRST CAUSE OF ACTION IN THE PROPOSED AMENDED COMPLAINT IS MAINTAINABLE BOTH IN LAW AND AT LEAST PRIMA FACIE IN FACT.

This cause of action seeks damages from defendant because of its breach of its independent agreement to elect plaintiff to the board of directors of Lem for the life of the agreement. Defendant has failed to answer the contention that the breach of that agreement by defendant is what opened the door for the board of directors of Lem, after plaintiff's wrongful removal therefrom, to find reasons, never communicated to plaintiff, to discharge him "for cause", a conclusion which plaintiff can show would have gone the other way if he had been present.

A contract such as this, made by the shareholders, is an enforcible contract.

Benintendi v. Kenton Hotel (1945 294 N.Y. 112;

Liberman v. Liberman (1965) 23 A.D.2d 545;

Storer v. Ripley (1953) 1 Misc.2d 235, aff. 282 A.D. 950.

In the last cited case, the Court upheld and enforced an oral contract to elect the plaintiff and another to the board, even though the by-laws of the corporation provided for removal of a director at any time by the vote of at least 50% of the stockholders.

This removal by Twin Disc of plaintiff from the board of Lem was not because of any dereliction on plaintiff's part, but because, as recited, it was "in the best interest" of Twin Disc. It was only subsequent to his removal from the board that three remaining members present voted to terminate his employment and to close down Lem's business. This was a decision that plaintiff as a director had a right to participate in -- a proposition that defendant has not contested. And the reply affidavits, as well as the original moving affidavit, show facts to the effect that this is not only a prima facie claim, but one well-supported by facts. Plaintiff could have been discharged only when the board decided that there was in its opinion just cause to terminate his contract and he had a right to be heard before such a decision was made.

Nor is plaintiff precluded from making his proof by any adjudication against him in his state court action against Lem. In the first place, that action was against a different defendant. Secondly, the former action was based on a different

obligation -- the obligation of Lem -- whereas this cause is against Twin Disc on its obligation. Granted, that as to the guaranty of performance by Lem, plaintiff is precluded from enforcing that guaranty, because plaintiff is no longer entitled to performance by Lem. But not so as to Twin Disc's obligation to elect plaintiff to the board of directors for the life of the agreement. And the life of the agreement had not ended when plaintiff was removed from the board.

The burden of showing clearly that a cause was litigated and determined in a former suit rests on the party making that claim, and the party making that claim must show that the former action was between the same parties or their privies; that the precise issue was tried or could have been tried in the former action; and there must be identity in each action, not merely in name, but in fact and substance.

Rudd v. Cowell, 191 N.Y. 114, 127-128;

Townsley v. Niagara Life Ins. Co., 218 N.Y. 228, 233.

Or, as stated by Chief Judge Cardozo in the case of Schuylkill Fuel Co., 250 N.Y. 304, 306-307, a former judgment is conclusive "when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights established by the first." Applying that test here, certainly nothing adjudicated in the action against Lem is incompatible with the proposed First Cause of Action as against Twin Disc.

Surely, the defendant here has not so clearly

established the claim of res judicata as to demonstrate that at least a prima facie case is not spelled out sufficiently so as to warrant permission to amend the pleading.

At p. 9 of its brief defendant argues that the former action against Lem conclusively established that the termination of Lem's business was justified. That question was never presented in that action and could not have been so presented. The mere fact that the stock acquisition agreement and the employment agreement were both executed at the same time did not ipso facto make one dependent on the other. They contain separate and entirely independent obligations. There was certainly no issue presented or could have been presented as to the premature termination by Twin Disc of Lem's business.

The cases cited at p. 7 have no application.

Thus, Vernitron Corp. (440 F.2d 105) merely states the obvious proposition that the doctrine of estoppel by judgment applies where the state court has "determined factual issues arising in a subsequent federal jurisdiction." And the other cases are equally inapplicable. For instance, Israel, 1 N.Y.2d 116 holds that a dismissal of an action against a broker for breach of contract precludes an action against a purchaser for allegedly inducing the breach. But in that case, even though the former judgment was against a different party, there was privity, because there could be no inducement to breach a non-existent contract.

But privity is not established merely because a

corporation is a defendant in a former action and its shareholder the defendant in the second action.

CONCLUSION

THE MOTION FOR LEAVE TO AMEND THE COMPLAINT SHOULD BE GRANTED IN THE INTEREST OF JUSTICE; AND THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

When this Court denied plaintiff's motion for summary judgment in this case on August 9, 1973, he wrote a memorandum saying that "the difficult substantive question involved should be decided only after an opportunity to develop the facts fully at a trial and not by interpreting affidavits." He also quoted from an opinion of the Second Circuit which said that

> "there are instances where summary judgment is too blunt a weapon to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case."

What was then appropriate in denying plaintiff's motion is even more appropriate now, where the claims and counterclaims are so much more complicated as to facts and difficult as to law. It is grossly unfair for defendant to burden this busy Court with the voluminous record which is being presented by it, in support of its motion for summary judgment.

In any event, it is urged that the motion for leave

to amend should be first passed upon and granted by the Court, and the defendant's motion denied.

Respectfully submitted,

SIDNEY S. BOBBE
Attorney for Plaintiff
25 West 54th St.
New York, N.Y. 10019

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION UNDER RULE 56 AND REPLY TO PLAINTIFF'S MOTION TO AMEND (Filed December 2, 1974) 227a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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72 Civ. 1582 (J.M.)

FRANK LOWELL, :

Plaintiff, :

-against- :

TWIN DISC, INCORPORATED, :

Defendant. :

- - - - - - - - - - - - - - - - - x

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION UNDER RULE 56 AND REPLY TO PLAINTIFF'S MOTION TO AMEND

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANK LOWELL, being duly sworn, deposes and says, in answer to the affidavit of Robert J. Kheel, Esq.:

1. Mr. Kheel tries to make it appear that I am seeking by my proposed amended and supplemental complaint to relitigate the issues decided against me in the state court action. I disavow any such intention. Indeed, if this Court denies my motion to serve the amended complaint, my counsel has advised me not to oppose the dismissal of the first two causes of action alleged in my original complaint in this Court. I believe, therefore, that the motion for summary judgment, as to those two causes of action, was both premature and unnecessary.

2. However, Mr. Kheel wholly fails to justify his motion insofar as it seeks to dismiss the third cause of action, which I would be entitled to litigate even if my application to amend should be denied, since that cause of action is not one related to the Lem employment contract, but one seeking to enforce the separate stock acquisition agreement entered into by defendant in acquiring the stock

of Lem Instrument Corp. That issue was not litigated in the state court and could not have been litigated there. I have reasserted that claim in the proposed amended complaint in the Third Cause of Action.

3. In view of the foregoing I shall not attempt to answer Mr. Kheel's assertions in support of his motion to dismiss the first two causes of action, except to say that he has made many characterizations of what happened on the trial that are wholly inaccurate and one-sided. Thus, he stresses the fact that substantial losses had been incurred in the operation of the business, without saying that there was no proof whatever that those losses were due to any shortcomings on my part or constituted a breach of any agreement I made. He also fails to point out that the business was one of a highly technical nature involving of necessity a long period of development, which the defendant recognized. He also fails to point out that a large part of the losses occurred in the first year and a half, due to the fact that the principal product at that time was a miniature electronic clutch used in the Apollo program, the need for which suddenly ceased, and this caused Lem to develop a completely new product, an electronic digital shaft encoder, which had a great market potential. On July 24, 1972, which was less than 90 days before I was discharged, I received a letter from Mr. Gibson, the Chairman of the Board of Lem, which concluded by saying: "Good luck, Frank, maybe this is the year we will get our breaks!" (p. 592) Yet it was admitted that when this letter was written defendant was fully aware of the results of operations for the preceding year, ending on

June 30, 1972, and without the slightest intimation of the losses being any cause for my discharge when I was discharged on October 9, 1972, admittedly "out of the blue." And Mr. Gibson even then refused to tell me the cause of my discharge. The resolution adopted at the directors' meeting authorizing the discharge stated that it was "based only on Mr. Gibson's report as to the circumstances leading up to the unauthorized discharge of Robert Everett by Frank Lowell together with the general review of the failure of the company to meet its anticipated goals." (Exh. B to proposed amended complaint.) Nothing about attributing any losses to me and nothing about whether Everett's discharge by me was justified. And certainly as president of the company I had the "authority" to discharge a subordinate employee, as he was. But he was not in fact discharged by me, but remained in Lem's employ until he was discharged by defendant at the same time that I was discharged.

Consequently, the decision of the state court could well be found to have been based solely on the failure of the company "to meet its anticipated goals," which does not imply any breach of my contract.

4. Mr. Kheel paints a false picture as to my discharging employees. It is true that I had discharged Joe Samuel 17 months before I was discharged, on an occasion when he became highly agitated at an innocent remark I had made, not to him, but out of his presence, to Mr. Everett -- resulting in Samuel's threatening me with violence and throwing an article at me -- facts confirmed by Mr. Everett, and not denied by Samuel. A week later I rehired him, but

he refused to continue in Lem's employ, saying he had made other commitments.

5. As to Mr. Everett, he deliberately refused to carry out my orders as president and challenged my authority. Yet he was continued in Lem's employ thereafter for two months, when he was discharged by defendant. The third employee I had discharged, Mr. Corruzzi, was discharged six months prior to my discharge, for good reasons, which were never challenged.

6. With no relevance to the motion, Mr. Kheel accuses me of having shown an "abusive and petulant attitude" at the trial. I deny the charge, and it is irrelevant anyway. He bases this charge on two minor incidents. One occurred when I was being cross-examined and I thought that a question was improper, whereupon the Court asked me if I wished to object to it, to which I respectfully replied affirmatively, and thereupon the Court first overruled the objection, but later when the question was repeated and my counsel objected to it, his objection was sustained. (p. 197) The other occasion occurred when my attorney asked me whether Mr. Everett had complained to me about his nervous condition, and Mr. Hughes objected to the question, and when the Court indicated that he was going to cut the inquiry short I interjected the respectful remark: "I think that is an important question, your Honor." Thereupon the Court chided me for acting as my own lawyer, and said he had ruled upon it. And I respectfully replied "Yes, sir." (p. 511) Mr. Kheel makes the unwarranted and false charge that I did so in a "belligerent tone."

7. He also goes on to say at p. 9 of his affidavit that he is informed and believes that "plaintiff"--meaning me--"recently took a trip to Wisconsin to talk to representatives of the defendant and to inform them that unless they meet his exorbitant and bizarre demands, he would take the very step that he has now taken, by moving for leave to serve an amended and supplemental complaint." Mr. Kheel is completely misinformed. These are the facts: While Mr. Bobbe was preparing the present motion, I personally decided to make an effort to see if it was possible to settle this litigation by talking directly to the president of defendant, Mr. Battem, and so I put in a telephone call to him in Racine. He was out at the time, but he called me back. I told him I thought it worth while for both parties to explore the possibility of bringing an end to the costly litigation, and that I thought that if he and I discussed it I could present some thoughts that might lead to that result. He was very cordial and friendly, and said he would be glad to meet with me for that purpose, but could not come to New York because he and his wife were both ill, and he invited me to come to Racine for that purpose, and he agreed that our talk would be a discussion only between the two of us. Accordingly I went to Racine and I presented a proposal to him, which I thought was reasonable, and he said he would not give me an answer unless I put it in writing. After I returned to New York, I did put it in writing and sent it to him, but I never received any response.

8. I thought that my efforts to discuss a settlement were privileged and not to be referred to, as

they now are in order to disparage me, and to make it appear, contrary to the facts, as if I was putting a gun to the head of defendant by making a threat to make this motion unless defendant acceded to my demands. In fact, it is the defendant which has used intimidation and harassment against me, by bringing an action against me while this action was pending in the United States District Court for the Eastern District of Wisconsin, seeking $712,500 in damages based on two counts, one arising out of the stock acquisition agreement and the other out of the employment contract, forcing me to engage a Wisconsin attorney to defend the action. In March, 1973, my attorney moved that court under Rule 12(b)(1) to dismiss for lack of jurisdiction over the subject matter, because this court was already seized of jurisdiction, and the claims asserted there had to be asserted here as a compulsory counterclaim under Rule 13 because they arose out of the same transaction or occurrence that are the subject of plaintiff's claim here.

9. Despite the fact that it should be obvious to any attorney that the claims, if valid at all, must be asserted in this action as a counterclaim and nowhere else, Twin Disc has vigorously opposed my motion. Although that motion was made 20 months ago, it has still not been decided, apparently due to the fact that Mr. Gibbs, the attorney for Twin Disc, secretly appealed to the Wisconsin judge to hold up his decision, pending the final outcome of my state court action, not this action. Thus, on July 10, 1974, Mr. Gibbs wrote a letter to District Judge Reynolds, a copy of which was sent to my Wisconsin attorney, in which letter he said he is "once again" requesting that the decision be deferred, pending the final outcome

of the state court action, thus indicating that he had previously made such requests, without notifying my attorney thereof.

10. And to make matters worse, after that motion was made defendant here asked for my consent to amend its answer so as to assert a counterclaim, which consent was given, and that counterclaim asserts the very claim asserted in Count 2 of the Wisconsin action, namely for damages due to my alleged misfeasance under the employment contract with Lem.

11. Thus, it is the defendant that has been employing threatening and unethical tactics so as to hold a double-edged sword over my head in order to force me to drop my claim.

12. In paragraph 12 (p. 10) of Mr. Kheel't affidavit he says that it was my "patent shortcomings that caused Lem's losses." There was not an iota of proof or any finding that any supposed "shortcomings" of mine caused a dollar of losses. The "losses" that the business had suffered up to the time of my discharge were wholly due to the nature of the business and the fact that up to that time most of the work had involved research and development, all of which was anticipated by defendant. Thus, I refer to Exhibit 24 of the trial (p. 601 record on appeal) in which Mr. Gibson on May 20, 1970, requested additional financing to Lem by defendant of $232,265.00, for the coming fiscal year, which was subsequently furnished. In this letter he says: "The basis for my recommendation is the current status of the shaft encoder development." He then reviews the unpredictable and

unavoidable causes for the losses previously incurred, saying: "The demise of the space and military programs, which none of us expected two years ago caused Lem to return to their encoder development." He also points out the enormous size of the potential market for the product. This letter was sent to Twin Disc and represented only Mr. Gibson's own conclusion. Yet all this is now disregarded by Mr. Kheel, and I am sought to be charged for the responsibility for the losses incurred all the way back to 1968, and for the subsequent operating "losses" incurred in the development of the shaft encoder, none of which was due to any "shortcoming" of mine.

13. But before that fiscal year referred to had ended Twin Disc was ready to give up the battle, for on February 26, 1971, Mr. Gibson wrote another letter to Twin Disc, a copy of which is annexed hereto as Exhibit 1, which commences by saying that he is "not the least bit ready to throw in the towel on Lem yet." And he then proceeds to give his reasons, all of which explain the delay in reaching a profit level upon the development of a new product.

14. Apparently this did not satisfy Mr. Batten, defendant's president, for on July 1, 1971, Mr. Gibson wrote Mr. Gibbs, defendant's attorney, a letter, a copy of which is annexed as Exhibit 2, showing (1) that he made transcripts of recorded phone calls to both me and Everett; (2) that he has informed Batten that Gibbs knew of the decision "to dispose of Lem"; and (3) that Batten is aware of his interest in determining an alternate solution "along the lines of locking out Frank [meaning me] and

hiring a competent person to manage the business." He also says that Batten's wishes are his command.

15. Yet when defendant received its accountant's report it decided it would be more expedient to await the end of the fiscal year before taking the contemplated action, as appears from Exhibit 1 annexed to my moving papers, entitled "Lem Divestiture Strategy."

16. When I served the original complaint I was unaware of any of these exhibits, which were only disclosed in August, 1973, as a result of a discovery ordered by the court.

17. If those losses had been due to any "shortcomings" of mine, how explain the fact that on the trial Mr. Gibson admitted that the discharge notice was given "out of the blue" with no previous intimation of any cause for discharge? How explain the fact that when examined before trial he testified that he had told Batten that he was prepared to come out of retirement and work with me, because he had great faith in the product and its profit possibilities?

18. At p. 13 Mr. Kheel says that the agreement to elect me to the board of directors is contained in the guaranty of defendant, which is the same contract which I breached by my failure to perform "competently," and which was the subject of the state court action. In the first place, the guaranty agreement is a separate agreement, containing obligations other than those of a mere guaranty. Secondly, it was not and could not have been the subject of the state court action. And in the third place, it was never alleged or proved in that action that I did not

perform "competently." My point is that but for my removal from the board of directors, contrary to my contract to be kept on the board for the life of the agreement, I would have been entitled at least to be heard before any decision was taken by the board to discharge me, and until such decision was taken there was no basis for my discharge. Only the directors could have decided whether any act or omission of mine justified my discharge.

19. It is not true that it was urged to the court and jury that the board of directors lacked authority to discharge me or that I was illegally removed from the board by Twin Disc, for its obligation under its agreement were never in issue and could not have been in issue in the action against Lem.

20. It is said, at p. 15, that my claim asserted both in the third cause of action of the original complaint and in the third cause of action in the proposed amended complaint, is not susceptible of proof, because it is inconceivable that the earnings in the remaining three years of the contract would be sufficient to extinguish the accumulated deficit incurred in prior years. This is merely Mr. Kheel's inexpert opinion, for, in view of the stage of development and of the visible prospects at the time of my discharge, I believe I can show through the mouth of Mr. Gibson and through his letters and reports, as well as much more evidence I can produce that it is more than conceivable, but highly probable that I can prove it.

In that connection I can show that customer interest had quickened itself long after the discharge.

Surely, the defendant here has not so clearly

Indeed, an import ant customer was so desperate to get repeat orders that when it could not contact anyone at Lem's premises, it sought me out and telephoned me at home, but I was helpless to do anything about it.

21. Moreover, Mr. Kheel has overlooked the fact that accumulated past losses were not to be considered if it resulted from a course of business action for Lem determined by the Board of Directors, which contemplated such a loss when in the long-term best interest of Lem, a factor applicable here. (See p. 3 of Kheel Ex. K)

22. At p. 17 Mr. Kheel attacks my proposed Fifth Cause of Action (which is part of the Third Cause of Action in the original complaint) by claiming that by the letter of October 9, 1972 (Kheel Exh. M) "Twin Disc gave plaintiff the option and he failed to exercise it." The letter speaks for itself, and it is clearly not the six-month option the agreement provided for, nor is it an option to acquire the "then outstanding shares of Lem at a price and upon terms not less favorable than the terms of such contemplated transaction." (See par. 10 of Kheel Exh. K, pp. 25-26.) The offer is one to sell the assets forthwith at the arbitrary value of $155,000, coupled with the demand that Everett and I accept one year's salary in exchange for releasing defendant of all contractual obligations. This was clearly not a compliance with the agreement.

23. Among the inter-office communications I learned about due to the discovery granted by this court, is a confidential report by defendant's Secretary, Mr. R. T. Howell, addressed to Mr. Gibson and Mr. Batten,

dated January 5, 1970, in which among other things he says that Twin Disc was obligated by the stock purchase agreement to give six months notice of any action by Twin Disc to dissolve or sell any part of Lem, or in any way to alter the corporate identity or ownership of Lem. In the event of such contemplated action on the part of Twin Disc, then Frank Lowell and Robert Everett, have, for the seven year term of the Contract, the right of first refusal to purchase all of the stock of Lem at the most favorable price and term basis." And he adds: "I believe we have to be very cautious in how we deal with this situation, for if we look like we are going to give up on Lem, there could be a temptation on their part to not move ahead on their new encoder development, figuring they could buy the whole company back from us for a song."

24. On p. 16 Mr. Kheel says that the state court action is dispositive of the issue that defendant was justified in closing Lem's business down. There is no basis for saying that, for it was the stock acquisition agreement which explicitly provided for my right to the 6-month option in the event of dissolution or sale of all or any of the assets of Lem, not the employment agreement, which is all that has been passed upon. That question was not and could not have been litigated in the state court.

25. Mr. Kheel says, inaccurately, at p. 17 that I testified that I "did not accept the option." My testimony was only that I did not accept the proposal contained in Kheel's Exh. M -- not "the option," for there was no such option.

26. Mr. Wheat in par. 19 (p. 18) claims that in order to show that this motion was not unduly delayed that I have misled the Court by asserting that the information upon which this motion is predicated was only discovered after the trial of the state court action. I made no such contention and certainly did not intend to mislead the Court. What I did and still do claim was that nearly all of it was unknown to me when the original complaint was filed, and was only discovered in August, 1973, upon the discovery ordered by this Court, but that I delayed making this motion until I knew the final outcome of the state court action, which I believe was the proper thing to do, for otherwise my original complaint would have sufficed. And then I moved as promptly as possible -- within a month after the Court of Appeals had denied my application to that court.

27. As to my proposed Second Cause of Action there has been important new evidence discovered, even since the trial of the state court action, consisting of the fact that Everett, its principal witness against me, who ostensibly was discharged for cause by defendant at the same time I was, is now in the employ of defendant, a fact he admitted when, in July, 1974, I saw him at the Lem premises packing its material, and again subsequent to my recent visit to speak to Mr. Batten, when I saw him packing during two days all its materials for shipment in trucks to Racine and supervising its removal to Racine. Also in the discovery proceedings in August, 1973, it was learned by me that immediately after his supposed discharge he was actively engaged on behalf of Twin Disc in endeavor-

ing to sell its assets, as evidenced by a letter of his to Twin Disc, dated November 14, 1972; also that in March, 1973, he was writing Twin Disc, complaining that he was entitled to a better offer of settlement than had been offered to me, saying "I have not asked for more than was agreed upon." Also there was revealed the fact, unknown to me when I filed my complaint here that subsequent to Twin Disc's determination to dispose of Lem, Gibson came to New York by pre-arrangement and secretly met with Everett, prepared with a tape recorder, and at a hotel took a tape recording of a long conversation with Everett directed towards his complaint against me, and also that illegal tape recordings of telephone conversations with both Everett and me were had and transcribed for the use of Twin Disc's attorneys. Cumulatively all of this would be persuasive, when coupled with the letter called "Lem Divestiture Strategy" as proof that my discharge was engineered by Twin Disc in bad faith in order to get rid of its obligations under its guaranty agreement and stock acquisition agreement, which otherwise would have survived the termination of Lem's business.

28. I therefore ask the Court to grant my motion to amend, and to deny defendant's motion, which becomes moot in the event that my motion is granted; and in any event to deny it with respect to my original third cause of action.

FRANK LOWELL

Sworn to before me this
27th day of November, 1974.

Serge Gelen

EXHIBIT 1 - LETTER DATED FEBRUARY 26, 1971 ANNEXED TO FOREGOING AFFIDAVIT.

PERSONAL AND CONFIDENTIAL

INTER-OFFICE COMMUNICATION W.F.&G.

TWIN DISC, INCORPORATED
Racine, Wisconsin

26 February 1971

TO: Mr. John H. Batten

cc: Mr. R. T. Howell
Mr. D. E. Beaton

SUBJECT: LEM INSTRUMENT CORPORATION
Ref.: Your memos 2/18/71 and 2/24/71

Pursuant to our discussion Thursday, I am not the least bit ready to throw in the towel on LEM yet. Before giving my reasons, let me first comment on Roger's memo of 16 February and then on Kellogg's memo of 1 December.

I take the responsibility for the negative attitude toward any suggestion that LEM undertake a Twin Disc project for electronic controls at this time for the following reasons:

a. By contract, we have made Frank totally responsible for a profit center and agreed to pay an additional sum for his company in relation to his meeting certain sales and profit targets over a seven (7) year period.

b. Any dilution of his efforts to meet his own Product Sales and profit forecasts resulting from a directive by Twin Disc could be interpreted as a violation of our contract agreement.

c. A Twin Disc project for an electronic governor is a minimum two year effort before reaching a market of limited volume entailing further financial outlays before commercial success.

Frank Lowell and Joe Samuel both have the engineering capability to design such a governor but probably would need some degree of familiarization with the application requirements before a practical design would result.

I would welcome the placement of such a project at LEM but -- only after they have proven to us that we made a good acquisition in July 1968.

You have, I believe, a copy of J. Kellogg's memo to Gordon Danhof wherein the following statement is made ..."it appears that the encoder that LEM offers is too limited for what the machine tool users are expecting today."

In general, and from Kellogg's point of view, the statement is correct.

Specifically, the statement is in error because it is the lack of adapting devices from LEM to meet the machine tool user's requirements that establishes the limitations -- not the encoder.

Kellogg points out that the encoder, if attached to the lead screw, requires a 10 pitch screw which no one has. Therefore the machine tool user requires a retrofit package complete with its own drive adaptor for each axis, such as the rack and pinion (Exhibit "A") or steel tape (Exhibit "B"), a pedestal stand with readouts for each axis (Exhibit "C") plus the encoder for each axis.

Attached as Exhibit "D" is an interesting story on Parametrics and their complete retrofit system.

LEM could use the same approach at the expense of considerable additional engineering time and tooling expense.

It has been mutually agreed by Frank Lowell and Twin Disc that he would get LEM off the runway with the product he currently has designed.

He believes he can do it and so do I!

Frank will have been with us three years this July 1971. The first thirteen months was concentrated on clutch sales and that story is well known to all of us. The clutch line is not dead but it will require more military and space programs to make it interesting.

The encoder program, a commercial product which offers us an excellent opportunity to enter new markets with new products, was conceived in August 1969, debugged and declared ready for production by April 1970 and first shipment made to Kaiser Aluminum in September 1970. Today's shipment of a $2500 order brings total sales this year to $17,000.

This represents twelve months from conception, through design, test, redesign, to first commercial sales of a pilot unit which compares most favorably with our project track records. When you credit LEM with being somewhat of an unknown in their market place compared to our stature in our markets, their record looks even better.

LEM is currently in the position of having sold pilot units to at least five OEM accounts from which we expect repeat orders as follows:

Customer	System Price	Anticipated Repeat Order
Kaiser Aluminum	$ 2,000	10-12 systems
Western Electric	1,500	2 "
Butler Mfg. Co.	1,043	15 "

Inquiries resulting in actual quotations are quickening in pace so that between new pilot sales and repeat orders plus just a little luck on timing, we can realize $100,000 sales by 30 June 1971.

The customer doesn't install the encoder immediately upon receipt and then requires in-house testing before he is ready to go with repeat orders.

W E & G

LEM has an excellent encoder and it is about to fly.

This 30 June 1971 after three years, we will have approximately $500,000 invested, including the purchase price. This compares with some of our own product projects and I just can't see throwing in the towel at this point.

If we do, I'm afraid we would almost have to give the company back to Frank and Bob right at a time when it is ready to go and then we would look real foolish. This statement is based upon the "Employment" agreement contained in the purchase contract which could cost us $250,000 for the remaining four years plus one year at 50% salary base.

I am meeting with Frank Monday and Tuesday preparatory to the Board meeting and, hopefully, will present more significant information at the meeting.

I will meet you at Providence Airport Tuesday evening.

W. B. Gibson

eb

EXHIBIT 2 - LETTER DATED JULY 1, 1971 ANNEXED TO FOREGOING AFFIDAVIT

copies: Mr. John H. Batten
Mr. R. T. Howell
Mr. M. E. Batten

W E & G

1 July 1971

Mr. Richard S. Gibbs
Gibbs, Roper & Fifield
757 North Broadway
Milwaukee, Wisconsin 53202

Dear Dick:

Attached are the transcripts of my phone calls of both Bob Everett and Frank Lowell that provide the meat of the conversations but do not tell the story as well as the tape itself.

I will be back in Racine late next week and Evie, my secretary, will know more precisely when by July 6. She will telephone you to determine when you would like to listen to the actual tape recordings.

I have informed John Patton that you now are aware of his decision to dispose of LEN and that you will proceed more seriously with your studies after July 4.

I have also informed John that you are aware of my interest in determining an alternate solution along the lines of locking out Frank and hiring a competent person to manage the business. In order to provide you with a small amount of information which is the basis for my concern, I am enclosing a copy of my latest report on the Encoder market dated 22 June 1971.

As you well know, John's wishes are my command but I feel very strongly that he should have all facts on hand before coming to a final conclusion.

Have a wonderful 4th and I will be in touch with you shortly thereafter.

Sincerely,

THIN DISC, INCORPORATED

Milton P. Gibson
Vice President
Corporate Development

MPG:eb
Enc.

REPLY AFFIRMATION OF SIDNEY S. BOBBE (Filed December 2, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK LOWELL,

Plaintiff,

-against-

TWIN DISC, INCORPORATED,

Defendant.

72 Civ. 1582 (J.M.)

REPLY AFFIRMATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SIDNEY S. BOBBÉ, attorney for plaintiff, for his reply to the affidavit of Robert J. Kheel, Esq., affirms to this Court, under penalty of perjury:

1. At p. 11 (par. 14) Mr. Kheel claims that plaintiff has changed the thrust of his action by the proposed amended complaint from one based on a guaranty of the employment contract to one for alleged breach of the stock acquisition agreement. This is wholly inaccurate. True, plaintiff has sought to withdraw the first two causes of action, which are based on guaranty of performance of the employment contract. But the original Third cause of action asserts a claim based on the stock acquisition agreement, and that claim is being reasserted in the proposed amended complaint, split up into the proposed Third and Fifth causes of action. As to them, there is certsinly no change of thrust. And, in addition, the proposed First cause of action asserts an independent claim of a breach by defendant of its agreement "to vote its shares of LEM stock to elect Lowell to LEM's board of directors during the life of this agreement."

2. Mr. Kheel asserts (p. 13) that "Twin Disc is entitled to rely in justification of plaintiff's removal as a director upon the same evidence of plaintiff's shortcomings adduced at the State trial." That proposition cannot be sustained. In the first place, the question of Twin Disc's breach of its agreement to keep plaintiff on LEM's board of directors was not in issue in the action against LEM, and, moreover, it could not have been in issue there. Therefore, it was never passed upon. The shareholders' (Twin Disc's) resolution ordering plaintiff's removal from LEM's board was stated to be "in the best interest" of Twin Disc, as the shareholder of LEM. Secondly, a fact found in a former action estops proof of the same fact in a later action only where there is either an identity of parties in both actions or privity, and there is neither here so far as the contract to keep plaintiff on the board is concerned. Thirdly, if there were true "shortcomings" established in the action against LEM, those shortcomings did not act as the basis of plaintiff's removal from the board. The termination of his employment was voted by the board only after he had been improperly removed therefrom and his voice as a director stilled. It was for the board, with him as a member, to decide whether any shortcomings were sufficient cause to terminate the employment, and plaintiff would have been entitled to participate in that decision if he had not been improperly removed. The board after due deliberation could well have decided that whatever his shortcomings were they were insufficient cause for his discharge.

3. Plaintiff will be prepared to show on a trial that Mr. Gibson admitted when examined before trial in

this action that the decision of the board, even in the enforced absence of both Lowell and Everett, was only "fairly unanimous". It will also be shown that Gibson testified on such examination that the "primary cause" for plaintiff's discharge by LEM was that LEM had not achieved success even though there was no contractual obligation for plaintiff to achieve success. It also will be shown that the real basis for the dismissal of the complaint in the State court was not because plaintiff had breached his contract, but for other reasons, not in issue in the case, the lack of financial success and plaintiff's alleged "incompetence" although no such defense was either pleaded or proved. The discharge was based principally upon the fact, as argued by the respondent in the Appellate Division, that the company had lost money, even though those losses were admittedly due to the nature of the business, which was to develop and market a new, highly technical product, and although there was no contractual obligation not to lose money, and no causal connection shown between such losses and any act of plaintiff.

4. Additional proof that plaintiff's discharge was not the fruit of any contractual breach by him is the testimony on the trial by Mr. Batten, defendant's president, that his decision as a member of the LEM board to discharge plaintiff was because of the failure "to meet the anticipated goals" (p. 381) even though he could find no provision in the contract which obligated plaintiff to reach any "anticipated" goals, and nothing in the contract to the effect that LEM would "achieve success". Plaintiff therefore has adequate proof to show at least prima facie

that if he had not been removed from the board in defiance of the agreement to keep him there, the board would not have voted to discharge him or to terminate LEM's business.

5. At p. 16 Mr. Kheel correctly states that paragraph 23 of the proposed amended complaint errs in saying that the guaranty of continued employment by plaintiff in New York is contained in the stock acquisition agreement, when in fact it is contained in the "guaranty agreement". This error was inadvertent and I ask permission to amend the phraseology of paragraphs 22-24 so that they then would read as follows:

> "22. On information and belief, that defendant has disposed of LEM, either through sale of assets or through sale of controlling interest in its stock.
>
> "23. That by the terms of the said guaranty agreement, the defendant agreed that if it so disposed of LEM, it would make available to plaintiff employment in New York City or Long Island at a comparable schedule of compensation provided in the employment contract.
>
> "24. That plaintiff has failed, refused and neglected to make such employment or any employment available to plaintiff, in breach of said agreement, to plaintiff's damage to the extent of $250,000."

6. I do not believe that this change in the allegations present any different question of law than that presented when it was mistakenly referred to as a breach of the acquisition agreement. The clause in question, while contained in the so-called guaranty agreement, is entirely independent of the guaranty of performance of LEM's contract.

Dated, New York, N.Y.
November 27, 1974

Sidney S. Bobbé

PLAINTIFF'S RESPONSE UNDER RULE 9(g) (Filed December 2,1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

72-C-1582 JA

----------X

FRANK LOWELL,

Plaintiff,

-against-

TWIN DISC, INSORPORATED,

Defendant.

----------X

Response Under Rule 9(g)

Plaintiff, for his response under Rule 9(g), alleges:

(1) Denies Items 8, 11, 12, 13, and 14 of defendant's statement.

(2) Denies items 15 and 16, but refers to the contents of the letter referred to in item 15 for its contents; and plaintiff admits that he did not accept the offer contained therein.

New York, November 27th, 1974.

SIDNEY S. BOREK,
Attorney for Plaintiff.
25 W. 54th Street,
New York, N.Y. 10019.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK LOWELL,	:	
Plaintiff,	:	72 Civ. 1582 (J.M.)
-against-	:	
TWIN DISC, INCORPORATED,	:	
Defendant.	:	

REPLY MEMORANDUM OF DEFENDANT TWIN DISC, INCORPORATED

Argument

No genuine issue of material fact remains for trial, and summary judgment should be granted in favor of defendant.

Plaintiff denies outright the following items of defendant's Rule 9(g) Statement:

"(8) Between July 3, 1968, and October 9, 1972, Lem incurred substantial losses aggregating over $256,000.

* * * *

(11) Between July 3, 1968, and October 9, 1972, defendant gave Lem $482,000 in capital.

(12) At its own expense, defendant hired a salesman, Gordon Danhoff, to help Lem.

(13) Plaintiff breached his employment contract with Lem and was legally and justifiably discharged.

(14) On October 9, 1972, defendant justifiably terminated Lem's business operations."

However, the facts asserted in Nos. 8, 11 and 12 were established by uncontroverted testimony in the State court action.* Moreover, as discussed more fully in the Kheel Reply Affidavit (¶¶3-9), the decision against Mr. Lowell in the State court action conclusively established the propositions asserted in Nos. 13 and 14 of the Rule 9(g) Statement.

With regard to the propositions asserted in Nos. 15 and 16, plaintiff in effect admits he did not accept Twin Disc's offer to him to repurchase Lem. He urges, however, that it was not an "offer", but only a "proposal". Whatever its name, it is obvious and undisputed that plaintiff declined an opportunity to repurchase Lem. He cannot now avoid the impact of this fact.

Plaintiff obviously is unhappy with the record in the State court action. He certainly ought not be proud of the evidence presented therein of his mismanagement of Lem. But the State court decision stands, and Lowell cannot dismiss in cavalier fashion the undisputed evidence presented in that action. There Lowell had full opportunity to litigate the reasons for his discharge by Lem and the circumstances thereof. The assertion that Twin Disc cannot benefit from the results of the State court action is in reality an attempt

---

* For the Court's convenience the text of such testimony is annexed as an addendum to this Reply Memorandum.

to thrust upon this Court a concept of "mutuality of estoppel" that has long been rejected under New York State law. B. R. De Witt, Inc. v. Hall, 19 N.Y. 2d 141, 147 (1967); Israel v. Wood Dolson Co., 1 N.Y. 2d 116, 119-120 (1956).

In this situation, the failure of plaintiff - who argues essentially that he is not bound by the State court determination adverse to him - to come forward with affirmative evidence to controvert the showing made by defendant requires the grant of summary judgment in defendant's favor.

Conclusion

For all of the reasons set forth hereinbefore, the Court should grant the motion of defendant for summary judgment dismissing the three causes of action set forth in the Complaint.

Respectfully submitted,

WILLKIE FARR & GALLAGHER
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, New York 10005
(212) 248-1000

MARK F. HUGHES
ROBERT J. KHEEL
RICHARD L. FELLER,
Of Counsel

Addendum

Mr. Batten testified as follows:

"Q Did Twin Disc infuse any capital into LEM?

A After the original acquisition we put in an additional $482,000.

* * * *

Q Now, Mr. Batten, are you generally familiar with the operations of LEM between 1968 and 1972?

A Yes, sir, I am.

Q Was it a successful operation or not?

A No, unfortunately, it didn't prove to be a success.

Q Can you tell us briefly and in a general way what the operating losses were?

A We, over a period of four years, lost something like $255,000. That was through the '72 year end.

Q And you are talking --

A June 30, 1972.

Q You are talking about direct operating losses?

A Direct operating loss of $255,000.

Q Were there any other losses?

A Well, there were unrecovered expenses met by Twin Disc. Did you wish those enumerated?

Q Please.

A We early in the game asked Mr. Gibson to function as chairman, so much of his time for this whole period was devoted directly to aiding and supporting LEM. LEM had a small organization. They were operating on a limited budget. Twin Disc paid Mr. Gibson full salary, of course, while he spent most of his time for four years trying to help LEM.

We also hired Mr. Danhof. I forget what date we employed him, but I recall it was about 1970 or '71. The record will have to make that clear. We paid Mr. Danhof full salary and expenses as an aid to Mr. Lowell so that we would have another qualified trained salesman available to help Mr. Lowell spread the product, the sales effort, over a wider market recognizing that Mr. Lowell was running the business and did have to spend a part of his time at home in the office running the business.

So these expenses, of course, are not reflected in the direct operating loss. We contributed them because we felt we had a program that justified this support without penalizing Mr. Lowell's own budget.

We also did give him strong advertising support out of the Twin Disc budget." (App. 345, 349-350.)

REPLY AFFIDAVIT OF ROBERT J. KHEEL IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FRANK LOWELL,	:	
Plaintiff,	:	72 Civ. 1582 (J.M.)
-against-	:	
		REPLY AFFIDAVIT
TWIN DISC, INCORPORATED,	:	
Defendant.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT J. KHEEL, being duly sworn, deposes and says:

1. I am an attorney-at-law duly admitted to practice in this Court and in the Courts of the State of New York. I submit this Reply Affidavit in support of defendant's motion for partial summary judgment and in opposition to plaintiff's motion for leave to serve an Amended Complaint.

2. Plaintiff agrees that the first two causes of action in his original complaint are barred by principles of res judicata and surety law. Nevertheless, central to plaintiff's reply papers is the untenable assertion that the decision in Frank Lowell v. Lem Instrument Corp., Index No. 73-1733 (the "State court action"), does not stand four square

for the proposition that plaintiff breached his employment contract with Lem and that he was justifiably discharged. For example, plaintiff urges that:

> "Consequently, the decision of the State court could well be found to have been based solely on the failure of the company 'to meet its anticipated goals,' which does not imply any breach of my contract." (Lowell Aff. p. 3).
>
> "There was not an iota of proof or any finding that any supposed 'shortcomings' of mine caused a dollar of losses." (Lowell Aff. p. 7).
>
> "it was never alleged or proved in that action that I did not perform 'competently.'" (Lowell Aff. pp. 9-10).
>
> "the real basis for the dismissal of the complaint in the State court was not because plaintiff had breached his contract, but for other reasons, not an issue in the case.... The discharge was based principally upon the fact, as argued by the respondent in the Appellate Division, that the company had lost money...." (Bobbe Affirm. p. 3).

3. Apparently, even now the plaintiff refuses to recognize that it was his mismanagement which caused Lem's substantial losses and personnel problems and that it was the evidence of his incompetence which justified his discharge and persuaded the jury to find in Lem's favor. Instead, plaintiff deludes himself and attempts to mislead this Court by urging that Lem relied in the State court action solely on the fact of its losses as support for his discharge.

4. Lem never urged that its enormous losses <u>per se</u> justified plaintiff's discharge. The Court's charge to the jury

made this abundantly clear. It charged the jury that:

> "On this issue of whether the Defendant was justified in dismissing the Plaintiff from his employment,... if the losses were sustained for any reasonsother than the failure of Plaintiff to faithfully and diligently perform his duties, and his best efforts to the Lem Corporation, then he may not be held responsible for those losses, and the fact of the losses, that losses were incurred alone would not be a breach of the contract by the Plaintiff." (App. 536-537).

5. There is no need to speculate as to what the issues were in the State court action, as plaintiff tries to do. (Lowell Aff. p. 3). In its Amended Verified Answer (Kheel Aff. Ex. D; App. 12-13),Lem detailed eleven specific shortcomings of plaintiff and pleaded that plaintiff had breached the employment agreement and was discharged for cause. As indicated in my moving affidavit in support of this motion (Kheel Aff. Pars. 10-13), extensive proof of these shortcomings was put in evidence at trial in the State court action. After Lem rested its case, the Court denied plaintiff's motion to dismiss, for lack of proof, the eleven specific shortcomings. (App. 497-503). The jury, after proper instruction, then found in Lem's favor. Despite all this, plaintiff persists in claiming that Lem neither pleaded nor proved his incompetence and mismanagement in the State court action. The State court jury charge (App. 522-561), together with the Court's denial of plaintiff's motion to dismiss, put to rest any such claim. In accordance with the applicable law regarding res judicata and

collateral estoppel, as set forth more fully in defendant's memoranda of law, plaintiff is now fully bound by such conclusive proof of his incompetence and of the reasons for Lem's losses, and he cannot now use this Court to relitigate his distorted and discredited views.

6. Plaintiff's proposed first cause of action reduces itself to simply this: he urges that his removal as a director of Lem was in breach of Twin Disc's obligation contained in its guarantee of the employment (Kheel Aff. Ex. L) to elect him a director of Lem, and that this removal denied him "a right to be heard before such a decision was made." (Pl. Reply Mem. 7). But principles of collateral estoppel bar plaintiff from now urging that Twin Disc was not justified in removing him as a director of Lem. The very same ample evidence which justified the directors of Lem (all employees of Twin Disc) in discharging plaintiff as an employee, support its decision to remove him as a director as well. Moreover, plaintiff is disingenuous in urging that an opportunity to be heard would have prevented his discharge. Twin Disc, the sole shareholder of Lem, had determined that plaintiff had mismanaged Lem and that Lem's business should be closed down. Its decision was vindicated by the jury. In short, since the sole shareholder believed that it was in the best interests of Lem to remove plaintiff as a director of Lem and to discharge him thereafter,

that result would have obtained regardless of anything plaintiff could then have said.

7. No matter how often plaintiff closes his eyes and wishes, the State court decision adverse to him will not go away. He has litigated the issues of his competence, Lem's losses and the reasons for his discharge - and he has lost. This singular fact infects and vitiates the third cause of action in plaintiff's original complaint and all of plaintiff's other claims in the proposed Amended Complaint, each of which repeatsand reallegesthe proposed first cause of action.

8. Plaintiff asserts that the acquisition agreement (Kheel Aff. Ex. K) and the employment agreement (Kheel Aff. Ex. L) were separate and distinct and the State court action dealt expressly only with the latter document. But, the claims raised by plaintiff here, or essential elements thereof, either actually were asserted in the State court action or could have been so asserted. Thus, evidence concerning the persistent lack of profitability on the part of Lem was introduced in connection with the consideration in the State court of plaintiff's shortcomings. Such evidence - not disputed by plaintiff then or now - conclusively establishes the vacuousness of plaintiff's claim here for additional payments in accordance with the terms of the acquisition agreement and the absence of any obligation on the part of Twin Disc to find alternate employment for plaintiff.

9. In response to the detailed record made by defendant

on this motion, plaintiff has failed to come forward with any facts indicating that any genuine issue of material fact remains for trial. Instead, he submitted a petulant and rambling affidavit replete with self-serving statements and gross distortions of the evidence at trial in the State court action. In essence, he seeks to relitigate the same issues in a different forum in the hope that somehow, some way, this Court will offer him a more sympathetic ear. Under these circumstances, the grant of partial summary judgment in favor of defendant is fully warranted.

WHEREFORE, it is respectfully submitted that partial summary judgment dismissing the three causes of action alleged in the Complaint should be granted in all respects.

Robert J. Kheel

Robert J. Kheel

Sworn to before me this
5th day of December, 1974.

Penny S. Hollender

Notary Public

Qualified in [illegible] County
Certificate filed in [illegible] County
Commission Expires [illegible]

AFFIDAVIT OF JOHN H. BATTEN IN SUPPORT OF MOTION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

FRANK LOWELL, : 72 Civ. 1592 JM

Plaintiff, :

-against- :

TWIN DISC INCORPORATED, : AFFIDAVIT

Defendant.

----------X

STATE OF WISCONSIN)
(SS:
COUNTY OF RACINE)

JOHN H. BATTEN, being first duly sworn on oath, deposes and says:

1. I am President of the defendant, TWIN DISC INCORPORATED, (Twin Disc") and have been President of said defendant since 1948. I am also, and have been since 1968, a Director of LEM Instrument Corp. I am familiar with the matters hereinafter stated by virtue of the aforesaid positions and by virtue of having attended the trial in the Supreme Court of the State of New York, County of Suffolk, of the action entitled "Frank Lowell vs. LEM Instrument Corp.," Index No. 73-1733. I submit this Affidavit in support of Twin Disc's motion for summary judgment and in opposition to plaintiff's motion for leave to serve an amended complaint.

2. I have reviewed the affidavit of Robert J. Kheel, sworn to the 5th day of November, 1974, and hereby adopt and confirm each of the averments contained therein.

3. In particular, I wish to emphasize that the Stock Acquisition Agreement, which is attached as Exhibit K to the Kheel Affidavit, and the Employment Contract, which is annexed as Exhibit L thereto, were executed as part of a single transaction. There would have been no employment contract in the absence of the acquisition of stock and there would have been no acquisition without the employment contract.

WHEREFORE, it is respectfully requested that Twin Disc's motion be granted in all respects, and plaintiff's motion be denied.

JOHN H. BATTEN

Sworn to before me this
13th day of November, 1974.

Notary Public, State of Wisconsin,
County of Racine

My Commission expires:
My Commission Expires March 21, 1978

(Notarial Seal)

PLAINTIFF'S REPLY AFFIDAVIT (Filed December 16, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

FRANK LOWELL, :

Plaintiff, :

- against - :

TWIN DISC, INCORPORATED, :

Defendant. :

- - - - - - - - - - - - - - - - - x

72 Civ. 1582 JM

REPLY TO BATTEN AFFIDAVIT

COUNTY OF NEW YORK)
: ss.:
STATE OF NEW YORK)

FRANK LOWELL, being duly sworn, deposes and says:

1. I have read the affidavit of John H. Batten, verified November 13th, 1974, and make this affidavit in reply thereto.

2. While it is true that the employment agreement was executed at the same time as the stock acquisition agreement, they were not made or intended to be dependent on one another. If it had been the intention to make them such, there is no reason why it was not so stated.

3. The stock acquisition agreement was separately and independently negotiated with Twin Disc by me; and so far as I was concerned there could very well have been a stock acquisition agreement without any employment agreement.

Sworn to before me this
15 day of December, 1974.

Frank Lowell

Notary Public

WILLIAM J. ROCKER
NOTARY PUBLIC, State of New York
No. 03-8700275 - Qual. in Bronx County
Certificate filed in New York County
Term Expires March 30, 1976

(Filed December 16, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - X

FRANK LOWELL, :

Plaintiff, :

- against - : 72-C-1582 JM

TWIN DISC INCORPORATED, :

Defendant. :

- - - - - - - - - - - - - - - - - - X

REBUTTAL MEMORANDUM OF PLAINTIFF

Defendant, in its reply memorandum, has taken issue with plaintiff's refusal to accept certain statements contained in response to defendant's enumeration under Rule 9 (g). Those refusals are all justified.

Thus, item "(8)" charges that Lem incurred "substantive losses aggregating over $250,000." Yet the memorandum annexes an extract from Mr. Batten's testimony, wherein he testified only that there were "operating losses" during the more than four years of operation, but a large part of those operating losses was due to the abandonment by all concerned of the original principal product made by Lem and the development of an entirely new product.

"Operating losses" therefore was not the same as "losses" without qualification.

Moreover, Batten did not testify, nor was there proof, that the "operating losses" were over $250,000. Nor was the amount of the losses ever relevant or ever decided, and certainly not relevant to the issue now presented.

As to item "(11)" plaintiff challenged it, because the proof did not show that defendant "gave" Lem $482,000 in capital. Part of what defendant paid over to Lem was in the form of loans and the rest capital investment. Here, too, it was not and is not relevant.

As to item "(12)" plaintiff disputes that Danhof was hired to help Lem or did in truth help Lem.

As to item "(13)" the denial is of the breach of the employment contract, while admitting that the State decision was based on a justifiable discharge; and that is why plaintiff has dropped the original first two causes of action.

As to item "(14)" there was no issue presented at any time or decided, as to whether or not "defendant justifiably terminated Lem's business operations," and that is one of the important questions still to be decided. Yet

defendant brashly asserts that it was "conclusively established."

As to items "(15)" and "(16)" defendant has resorted to sophistry in saying that plaintiff admits that he did not accept the offer to sell to him and Everett the assets of Lem (represented by Exhibit A annexed to the original complaint). But such an offer was not what the stock acquisition agreement called for, which was a six-month option to match the best offer received by defendant. These items were therefore highly irrelevant to defendant's statement under Rule 9 (g) and plaintiff properly refused to accept them. Nor was the question ever decided in the State Court, because it was not in issue.

Defendant claims that "plaintiff's assertion that Twin Disc cannot benefit from the results of the State Court action is in reality an attempt to thrust upon this Court a concept of 'mutuality of estoppel' that has been long rejected under New York State law."

In the first place, plaintiff is not attempting to escape the result of the State Court determination where it is applicable, as it is with reference to the first two original causes of action, which have been dropped. It is applicable there, because the same identical issue would

be involved here, namely whether plaintiff's discharge by Lem was justified. But not so as to an issue not decided in the action against Lem and which could not have been decided in that action. Therefore, plaintiff does not have to, and does not, invoke the doctrine of mutuality, which is no longer the law in New York.

But it is still the law, as stated clearly in the very cases that reject the doctrine, that the issue decided in the prior action must be identical with that presented in the subsequent action. Thus in the case of B. R. DeWitt, Inc. (19 N.Y. 2d 141), in which case the Court of Appeals definitely rejected the doctrine of mutuality, the driver of plaintiff's vehicle had recovered a judgment against the defendant for negligence, and it was held that the plaintiff was entitled to summary judgment when he sued for damage to his truck, because, said the Court of Appeals (at 19 N.Y. 2d 143) "the issue in both the former action and this were identical -- that both cases turned on the findings that Hall was negligent and Farnum was not" and that "the determination of those issues binds Hall."

And in Schwartz v. Public Administrator, 24 N.Y. 65, 71, Judge Keating put the question succinctly by saying:

> "New York law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel.

> There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling."

And at p. 73 he added the following statement, which is also highly pertinent here:

> "The burden of showing that the issue was identical and necessarily decided rests upon the moving party."

(Townsley v. Niagara Life Ins. Co., 218 N.Y. 228, 233.)

And to satisfy that burden it must be "clearly" shown. (Townsley v. Niagara Life Ins. Co., 218 N.Y. 228, 233).

Applying these tests here, the defendant's motion for summary judgment must be denied, and by the same token plaintiff's motion for leave to serve the amended complaint must be granted.

REGARDING THE BATTEN AFFIDAVIT

Mr. Batten states that the employment agreement and the stock acquisition agreement were executed as part of a single transaction, but they dealt with different subject matters and were not by their terms made dependent upon one another. According to Mr. Lowell's reply thereto,

they were not intended to be interdependent. If they had been so intended, there is no reason why it was not so stated. Assuming that Twin Disc had first breached its stock acquisition agreement, surely that would not have afforded the plaintiff the right to sue for a breach of his employment agreement. Or suppose the plaintiff had died before completing the term of his employment, would his estate be deprived of its rights under the stock acquisition agreement? Certainly not.

Mr. Batten gives it on his opinion that one agreement would not have been made without the other, but Mr. Lowell challenges that statement in his reply thereto. Surely, this Court cannot decide that claim upon the basis of conflicting affidavits.

TYPOGRAPHICAL ERROR IN PROPOSED COMPLAINT

In paragraph 29 of the proposed amended complaint reference is made to paragraph 17 of the stock acquisition agreement. The intended reference, which is obvious, was

to page 17, where the quoted part of the agreement is contained.

Respectfully submitted,

SIDNEY S. BOBBE
Attorney for Plaintiff
25 West 54th Street
New York, N.Y. 10019

December 13, 1974

AFFIDAVIT OF JOHN H. BATTEN
(Filed December 20, 1974)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

FRANK LOWELL,

Plaintiff,

-against-

TWIN DISC, INCORPORATED,

Defendant.

----------X

72 C 1582 (JM)

STATE OF WISCONSIN)
(SS:
COUNTY OF RACINE)

JOHN H. BATTEN, being sworn on oath, deposes and says that he is President and General Manager of TWIN DISC, INCORPORATED, sole shareholder of LEM INSTRUMENT CORP. That said LEM INSTRUMENT CORP. has not been sold nor has its assets been sold or disposed of, except as detailed below, and that TWIN DISC, INCORPORATED is still the sole shareholder of LEM and through LEM the owner of all of its assets particularly including those which the plaintiff herein Frank Lowell alleges to have had a right to purchase or acquire under a stock purchase agreement previously in these proceedings

referred to.

Electric typewriter to Robert Everett for $25

Blueprint machine to Sonicor Instrument Corp. for $35

Miscellaneous steel and aluminum to A & W Specialty Co. for $125

Two drafting tables and lights to Joseph Cardi for $75

John H. Batten

JOHN H. BATTEN

Sworn to before me this 15th day of December, 1974.

Notary Public, State of Wisconsin,
County of Racine

My Commission expires:
My Commission Expires March 31, 1978

(Seal)

MEMORANDUM OF DECISION AND ORDER (Filed March 31, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - -x

FRANK LOWELL,

Plaintiff,

- against -

TWIN DISC, INCORPORATED,

Defendant.

- - - - - - - - - - - - - - - - - -x

No. 72-C-1582

Memorandum of Decision and Order

March 28, 1975

Plaintiff moves for leave to amend his complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. Defendant opposes plaintiff's motion to amend, and moves for an order granting summary judgment against plaintiff on the ground that his claim is barred by res judicata.

On July 3, 1968, plaintiff entered into two written agreements (an employment agreement and a stock acquisition agreement) with Lem Instruments Corporation ("Lem") and guaranteed by defendant. Pursuant to the terms of these agreements, plaintiff and his partner sold their stock (consisting of all the outstanding shares) in Lem to defendant. In return, plaintiff received 3,680 shares of Twin Disc stock and was hired as president and general manager of Lem for a period of seven years. The employment agreement, was specifically

PPI SS-3-17-72--30M—9153

conditioned upon plaintiff's faithful and diligent performance of his duties. The stock acquisition agreement was likewise implicitly conditioned upon plaintiff's continued status as an employee in good standing. /1

From the time the contracts were executed in July of 1968 until the company's dissolution in October 1972, Lem operated at a loss. In the four years of its existence Lem lost over $250,000. During this same period Twin Disc advanced Lem over $450,000 in an effort to bolster its business. On October 9, 1972, however, the board of directors of Lem voted to cease operations and to discharge Mr. Lowell for failure to perform his duties under the agreement. On this same date, pursuant to a clause in the acquisition agreement, Twin Disc sent a letter to Mr. Lowell offering to sell him the outstanding shares of Lem. Plaintiff did not respond to this offer.

/1 Although the agreement does not contain a clause conditioning payment upon plaintiff's continued employment consistent with the terms of the contract and Lem's continued existence, since both contracts were executed simultaneously and for the same purpose -- to finalize the sale of Lem -- such terms must be presumed.

Shortly after Lem's dissolution and his dismissal, plaintiff commenced the present suit against Twin Disc in Suffolk County Supreme Court. The action was subsequently removed to this court pursuant to 28 U.S.C. §1441. During the pendency of this proceeding, plaintiff commenced a separate action against Lem in Suffolk County Supreme Court. In this latter action plaintiff sued for damages and lost wages, claiming that defendant Lem breached its employment agreement by wrongfully discharging him. Defendant maintained that plaintiff's discharge was for cause, based on his failure to perform his duties in accordance with the terms of his employment agreement.

This action, Lowell v. Lem Instruments Corp., 73-1733 (Supreme Court Suffolk County), was tried before Judge Scileppi and a jury in Suffolk County Supreme Court in October 1973. The jury returned a unanimous verdict in favor of defendant on October 12, 1973. This judgment was unanimously affirmed by the Appellate Division (44 A.D.2d 909 (2d Dept. 1974)) and the Court of Appeals denied permission to appeal, 34 N.Y.2d 520 (1974).

Defendant's opposition to the motion to amend and the motion for summary judgment is based on the res judicata

effect of the judgment against plaintiff in the state court. As an initial matter, it is clear that defendant Twin Disc may properly assert the defense of res judicata even though it was not a party to the prior action. Since Twin Disc owned and controlled Lem at the time of the events in issue in both actions, there is a sufficient relationship of privity between the two parties to permit this defendant to assert the res judicata defense. E.g., Nickert v. Puget Sound Tug & Barge Co., 335 F.Supp. 1158 (W.D.Wash. 1971); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141 (1967).

The issue remaining for determination is whether the prior judgment bars litigation of the claims and proposed claims asserted in this action. To resolve this issue it is necessary to determine what matters were decided by the earlier judgment. From the pleadings, the evidence and the judge's charge, it is apparent that the primary questions before the jury were whether the dissolution of Lem and the discharge of plaintiff were justified. In this regard defendant produced substantial evidence supporting its contention that Lem was dissolved because of its substantial losses and that plaintiff was discharged for cause. /2 Therefore, the verdict in favor of

/2 There was considerable testimony at trial that plaintiff fired Lem's most valuable employees, that he disregarded and mismanaged Lem's business and that he was abusive to his employees.

defendant can only be interpreted to mean that the trier of fact was convinced that the defendant did not breach the employment agreement with plaintiff, and that his discharge as well as the dissolution of Lem were justified.

The doctrine of res judicata bars relitigation of those issues actually litigated in a prior proceeding as well as those issues which could have been litigated in that proceeding. E.g., Williamson v. Columbia Gas & Electric, 186 F.2d 464, 469 (3d Cir. 1950); Keys v. Sawyer, 353 F.Supp. 936, 940 (S.D.Tex. 1973). The claims raised in plaintiff's original complaint, as well as those raised in the proposed amended complaint all relate directly to the issue of plaintiff's discharge and its effect upon the 1968 agreement. It is evident that all the claims now asserted by plaintiff in the present action could have been litigated in the state court proceeding and are therefore barred.

The first two causes of action in the original complaint are identical to the claims raised in the Lem action, and, as plaintiff readily concedes, are obviously barred here. The third cause of action in the original complaint, as well as the six causes set forth in the proposed amended complaint each seek damages under the 1968 employment and stock acqui-

sition agreements. In each instance the cause is based, either explicitly or implicitly, on the claim that defendant breached the agreement by wrongfully discharging plaintiff. Since this underlying issue has already been litigated and determined against plaintiff, the court will not reconsider the state court judgment or the subsidiary issues raised here. Although plaintiff has attempted to frame his proposed complaint so that it appears to raise new issues, it is clear that all the claims ultimately depend upon plaintiff's rights under the 1968 agreements. Since it has been determined that plaintiff breached this employment agreement and thereby forfeited his rights to enforcement of this agreement the claims set forth in his complaint are barred. Moreover, while rule 15(a) states that leave to amend should be freely given, where such an amendment would be futile because the claim itself would be subject to dismissal, the motion to amend should be denied. DeLoach v. Woodley, 405 F.2d 496 (5th Cir. 1969). Consequently, plaintiff's motion for leave to amend is denied, and defendant's motion for summary judgment is granted and it is

SO ORDERED.

IPI--SS--3-17-72--30M--9153

The Clerk of the Court is directed to enter judgment in favor of defendant and against plaintiff dismissing the complaint.

U. S. D. J.

MOTION UNDER RULE 59 (Filed April 8, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

FRANK LOWELL, : 72-C-1582 JM

Plaintiff, :

-against- : MOTION UNDER RULE 59

TWIN DISC, INCORPORATED, :

Defendant. :

----------X

SIRS:

PLEASE TAKE NOTICE that upon the order and decision of this Court, entered in the office of the Clerk of the Court on the 31st day of March, 1975, the undersigned will move this Court, on the 18th day of April, 1975, at 10:00 o'clock in the forenoon of that day, at Court Room 5, Fourth Floor, at 225 Cadman Plaza East, Brooklyn, New York, for an order, pursuant to Rule 59 FRCP, granting reargument of its decision, on the ground that the Court overlooked important questions of law and fact in making its decision, as more fully set forth in the annexed memorandum.

Dated: New York, New York
April 7th, 1975

SIDNEY S. BOBBÉ
Attorney for Plaintiff
25 West 54th Street
New York, New York 10019

To:

WILLKIE, FARR & GALLAGHER, ESQS.
Attorneys for Defendant
1 Chase Manhattan Plaza
New York, New York 10005

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR REARGUMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FRANK LOWELL, : 72-C-1582 JM

Plaintiff, :

-against- :

TWIN DISC, INCORPORATED, :

Defendant. :

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR REARGUMENT

It is respectfully urged that in denying plaintiff's motion to amend his complaint and in granting defendant's motion for summary judgment, the Court overlooked the following errors of law, which will be discussed in the order in which they appear in the decision.

I

On page 2 it is said:

> "The stock acquisition agreement was likewise implicitly conditioned upon the plaintiff's continued status as an employee [of Lem] in good standing."

And in the footnote it is said:

> "Although the agreement does not contain a clause conditioning payment upon plaintiff's continued employment consistent with the terms of the contract and Lem's continued existence, since both contracts were executed simultaneously and for the same purpose - to finalize the sale

of Lem such terms must be presumed."

It is believed that these statements are in direct conflict with the rule laid down in Schwartz v. Public Administrator, 24 N.Y. 2d, 65, 71, for it was there stated:

> "New York law has now reached the point where there are two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling."

And at page 73, the Court said that

> "... the burden rests on the defendant to show that collateral estoppel should not be applied because he did not have a full and fair opportunity, just as the burden of showing that the issue was identical and necessarily decided rests upon the moving party. This apportionment of the burden is both fair and necessary."

Thus, there never was a fair opportunity to contest the claim now being asserted for the first time, but the defendant had refused to contest it in the state court, by removing it to this Court. And in view of the disparate nature of their contents, how can it be said that defendant has fulfilled the burden of showing that the "identical issues have necessarily been decided"?

In concluding, as this Court does, that the stock acquisition agreement was implicitly conditioned upon the plaintiff's continued status as an employee in good standing, when other and contrary inferences are possible, it falls

far short of showing that the issue in the State Court was identical with that raised here and that it was "necessarily decided," there.

In the Schwartz case a passenger in cars involved in a collision obtained a verdict against one of the drivers for his negligence and the freedom from negligence of the other driver. The identical issue of such negligence was therafore necessarily decided in the first suit and did not have to be established again even though there was no identity of parties.

But here we have no identity of issues decided, but nothing more than a mere presumption that the acquisition agreement was impliedly conditioned on the continued employment of plaintiff by Lem. And yet there is nothing to justify that conclusion. How else can it be explained that despite the discharge of both Lem and Everett evidenced by the resolution of October 4th, 1972, Mr. Gibson was at the same time "authorized to negotiate with Frank Lowell and Robert T. Everett with respect to the possible acquisition by them of the assets of Lem Instrument Corporation . . ." (Defts. Exh. OO; Defts. App. 49). If Lowell had forfeited his rights under the stock acquisition agreement, then why negotiate with him for the acquisition of Lem's assets? Only because that right survived his discharge. Yet this decision in effect says that he has

forfeited his rights to acquire that stock, even though that question was never presented or raised or decided in the State court. Is it to be held that he has forever forfeited the right to acquire the stock merely because he was properly discharged?

II

At page 2 of the decision it is erroneously stated:

> "On this same date, pursuant to a clause in the acquisition agreement, Twin Disc sent a letter to Mr. Lowell offering to sell him the outstanding shares of Lem. Plaintiff did not respond to this offer."

In the first place, the offer to sell the outstanding shares was not made "pursuant to a clause in the acquisition agreement" because according to that clause (par. 10 of Exh. K, p. 25) the offer was to be one of an "option exercisable at any time within six months following such notice to acquire from Twin Disc all of the then outstanding shares of Lem at a price and upon terms not less favorable than the terms of such contemplated transaction" but no such option was ever extended. Instead, there was an arbitrary offer to sell at an arbitrary price, for $155,000. exercisable immediately. This was a direct violation of the acquisition agreement, never involved or that could have been involved in the action for wrongful discharge. It was indeed an obligation which was recog-

ni'ed to have survived despite the discharge for cause.

Furthermore, how could that question have been presented on the action brought for the discharge, since Twin Disc had removed this action from the State court to this Court because of diversity of citizenship.

How can it be said that that question was "necessarily decided" in the State court or that plaintiff had "a full and fair opportunity to contest that decision"?

III

The decision overlooks the proposed First Amended Cause of Action, which seeks to enforce that portion of the so-called guaranty agreement by which Twin Disc agreed to elect Lowell to Lem's board of directors for the life of the agreement. On October 4, 1972, while the agreement was still in force, plaintiff and Everett were summarily removed by Twin Disc from the Board of Directors of Lem in violation of that agreement. That action was taken before there was any meeting or decision taken by Lem's board to terminate his employment. Yet both Lowell and Everett had every right as directors to be heard before such a vote could lawfully have been taken. It is not as though there had been one outstanding and definitive act done by Lowell that ipso facto justified his discharge. It was primarily a question of judgment by the entire

board, as to whether or not his entire course of conduct justified the discharge. Assuming that the board had the right to decide to discharge him, it does not necessarily follow that it could have exercised that right without first giving him the right to be heard.

Now, it certainly cannot be argued that that question was necessarily decided in the Lem breach of contract action, or that plaintiff had had a full and fair right to contest it. Indeed, when the contract containing that agreement was offered in evidence, Mr. Hughes said (p. 15, Case on Appeal):

> "Your Honor, may I ask that Mr. Bobbe stipulate that the contract which he has referred to is not in suit in this action?"

To which Mr. Bobbe replied:

> "We are not suing on that guaranty in this action, that's right."

Is the plaintiff now to be precluded from relying on that agreement, which Mr. Hughes expressly insisted was not in suit? Yet the breach of the Twin Disc contract to keep him on the board of Lem is a pivotal question in this case.

IV

At page 4 it is said that the issue is whether the prior judgment bars litigation of the claims and proposed claims asserted in this action, and that to resolve

this issue "it is necessary to determine what matters were decided by the earlier judgment." But then the opinion falls into cardinal error in saying:

> "From the pleadings, the evidence and the judge's charge, it is apparent that the primary questions before the jury were whether the dissolution of Lem and the discharge of plaintiff were justified. In this regard defendant produced substantial evidence that Lem was dissolved because of its substantial losses and that plaintiff was discharged for cause."

A careful examination of the pleadings, the evidence and the judge's charge, reveals no basis for concluding that the "dissolution of Lem" - as opposed to the discharge of plaintiff - was caused by the losses incurred. It was certainly nowhere pleaded, and never mentioned in the Court's charge. Where then is there any basis for saying that the "identical issue" was decided or could have been decided? How can it be said that the plaintiff had the "full and fair opportunity" to contest that issue, in view of Twin Disc's removal of that issue to this Court?

Nor is there any basis for saying, as the decision does, at 5, that the verdict in favor of defendant can only be interpreted to mean that the "dissolution of Lem" was justified. And that it is "evident that all the claims now asserted by plaintiff in the present action could have been litigated in the State court proceeding

and are therefore barred."

How could they have been litigated there in view of the fact that they were not an issue there and had in fact been removed from the jurisdiction of the State court by removal to this Court?

V

The decision concludes by saying that while leave to amend should be freely given, it should be denied where the granting thereof would be futile, citing the case of De Loach v. Woodley, 405 F. 2nd 496 (5th Cir. 1969). But there is no comparison between that case and this, for there the complaint had been dismissed for failure to allege the requisite jurisdictional amount, and the motion to amend was one to attempt to correct the deficiency, and the motion was denied because on the face of it the deficiency still remained. No such situation exists here, for as to each proposed amendment plaintiff at least shows a strong prima facie case.

CONCLUSION

It is respectfully submitted that a reargument should be granted, primarily because the court erroneously concluded that the stock acquisition agreement was passed upon in the State court; that the plaintiff had "a full and fair opportunity" to contest there the claims raised here, and that the "identical issues" now presented were there passed upon and decided adversely to the plaintiff's present contentions. And this despite the fact that the defendant had prevented a determination thereof in the State court by removing the action against it to this Court.

New York, April 7th, 1975

Respectfully submitted,

Sidney B. Bobbe
Attorney for Plaintiff
25 West 54th Street
New York, New York 10019

MEMORANDUM OF DECISION AND ORDER (Filed April 8, 1975)

OFFICE RECORD

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IN CLERK'S OFFICE
U.S. DISTRICT COURT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FRANK LOWELL,

Plaintiff,

-against-

TWIN DISC, INCORPORATED,

Defendant.

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72 C 1582

Memorandum of Decision and Order

April 8, 1975

Plaintiff moves to reargue the decision of this court in the above entitled action, dated March 28, 1975. Plaintiff's memorandum submitted in support of his motion fails to raise any controlling legal or factual issues which had not been considered by the court in the course of its original determination. Consequently, under Rule 9(m) of the General Rules of this court, there is no ground for granting reargument.

The motion for leave to reargue is denied and it is

SO ORDERED.

U. S. D. J.

NOTICE OF APPEAL (Filed April 24, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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FRANK LOWELL,

Plaintiff,

-against-

TWIN DISC, INCORPORATED,

Defendant.

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No. 72-C-1582 (J.M.)

NOTICE OF APPEAL

Notice is hereby given that Frank Lowell, plaintiff above named, appeals to the United States Court of Appeals for the Second Circuit from the order of the Hon. Jacob Mishler dated March 28, 1975 denying plaintiff's motion to amend his complaint purusant to Rule 15(a) of the Federal Rules of Civil Procedure and granting defendant's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and from the judgment entered thereon.

Dated: New York, New York
April 22, 1975

JOSEPH M. WEITZMAN
521 Fifth Avenue
New York, New York 10017
(212) MU. 7-7505

TO:

Clerk, United States District Court
Eastern District of New York

Willkie, Farr & Gallagher, Esqs.
Attorneys for Defendant
One Chase Manhattan Plaza
New York, New York 10005

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
SECOND CIRCUIT

FRANK LOWELL,

Plaintiff-Appellant,

- against -

TWIN DISC INC.,

Defendant-Appelee.

Index No.

75-7259

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1027 Avenue St. John, Bronx, New York
That on the 27th *day of* June *1975 at* One Chase Manhatten Plaza, N.Y., N.Y.

deponent served the annexed Appendix *upon*

Wilkie Farr & Gallagher

the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 27th
day of June 1975

Robert T. Brin

Victor Ortega

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977